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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1262

GENERAL MOTORS CORPORATION, et al., *Petitioners,*

v.

DOUGLAS M. COSTLE, Administrator of the Environmental Protection Agency, ENVIRONMENTAL PROTECTION AGENCY, AND STATE OF CALIFORNIA, *Respondents.*

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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Chrysler Corporation
Motor and Equipment Manufacturers Association
Automobile Importers of America, Inc.
Automotive Service Industry Association, *et al.*

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. Nature of the Case	4
B. Proceedings Below	5
REASONS FOR GRANTING THE WRIT	13
I. BY ACQUIESCING IN THE ADMINISTRATOR'S "MINISTERIAL" REVIEW, THE COURT BELOW SUBVERTED JUDICIAL PRECEDENT COMMANDING THAT THE ADMINISTRATOR AFFIRMATIVELY PROTECT NATIONAL POLICIES RECOGNIZED BY THE ACT	15
II. THE COURT BELOW ERRONEOUSLY UPHELD THE ADMINISTRATOR'S REFUSAL TO CONSIDER THE EFFECT OF PROPOSED WAIVERS ON SUCH STATUTORILY RELEVANT POLICIES AS "PUBLIC HEALTH AND WELFARE," AUTOMOBILE SAFETY, AND COMPETITION.	18
III. THE COURT BELOW ERRED BY ALLOWING THE ADMINISTRATOR TO IGNORE FIRST AMENDMENT RIGHTS AND BY UPHOLDING THE CONSTITUTIONALITY OF THE REGULATIONS CONTRARY TO THIS COURT'S MANDATE IN *VIRGINIA STATE BOARD*	21
IV. THE COURT BELOW ADOPTED AN EXTRAORDINARY AND EXCESSIVE STANDARD OF DEFERENCE TO THE ADMINISTRATOR'S STATUTORY INTERPRETATIONS	24
CONCLUSION	26

TABLE I—MAINTENANCE REQUIREMENTS GENERAL MOTORS WOULD HAVE MADE IN 1980 ABSENT ARB REGULATIONS 28, 29

TABLE II—MAINTENANCE REQUIREMENTS ALLOWED BY ARB REGULATIONS 30, 31

TABLE OF AUTHORITIES

Cases Cited PAGES

Baltimore and O.R. Co. v. United States, 386 U.S. 372 (1967) 25

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 23, 24

Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281 (1974) 18

Brennan v. Occupational Safety and Health Review Commission, 492 F.2d 1027 (2d Cir. 1974) 15

Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971) 16, 25, 26

Carey v. Population Services International, 431 U.S. 678 (1977) 23

Central Hudson Gas & Electric Corp. v. Public Service Commission, No. 79-565, *prob. jur. noted,* 100 S. Ct. 446 (1979) 22, 23

Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) 15

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 18

Consolidated Edison Co. v. Public Service Commission, No. 79-134, *prob. jur. noted,* 100 S. Ct. 41 (1979) 22, 23

Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970) 22

Engineers Public Service Co. v. SEC, 138 F.2d 936 (D.C. Cir. 1943), *vacated on other grounds,* 332 U.S. 788 (1947). 21

Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 969 (1974) 18

Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968) 20

Ford Motor Company v. EPA, No. 78-1791 (D.C. Cir. August 17, 1979) 12

Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 847 (1972) 15

Gulf State Utilities Co. v. FPC, 411 U.S. 747 (1973) 20

International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) 18

Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972) 17

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 23, 24

Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974) 22, 23

Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir.), *aff'd*, 440 U.S. 689 (1978) 22

Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970) 15

Motor and Equipment Manufacturers Association, Inc. v. Costle, No. 78-1896 (D.C. Cir. Aug. 3, 1979) ..... *passim*

Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969) 15

Plano v. Baker, 504 F.2d 595 (2d Cir. 1974) 22

Richmond Power & Light v. FERC, 574 F.2d 610 (D.C. Cir. 1978) 20

SEC v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970) 21

South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974) 18

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 21, 22, 23, 24

Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission, 390 U.S. 261 (1968) 24

Zuber v. Allen, 396 U.S. 168 (1969) 26

FEDERAL STATUTES CITED

Clean Air Act, 42 U.S.C. § 7401 et seq. 14

§ 177, 42 U.S.C. § 7507 14

§ 202, 42 U.S.C. § 7521 ..... 5, 6, 8, 19

§ 203, 42 U.S.C. § 7522 5

§ 206, 42 U.S.C. § 7525 5

§ 207, 42 U.S.C. § 7541 ..... 3, 5, 6, 7, 11, 14, 19, 21

§ 209, 42 U.S.C. § 7543 ..... 3, 4, 8, 9, 12, 13, 14, 16, 17, 19, 20, 25

§ 302, 42 U.S.C. § 7602 ..... 19, 20

§ 307, 42 U.S.C. § 7607 ..... 2, 11

§ 317, 42 U.S.C. § 7617 19

28 U.S.C. § 1254 2

Public Law No. 90-148, § 22, 81 Stat. 501 (1967), renumbered and amended, Pub. L. No. 91-604, §§ 8(a), 11(a)(2)(A), 15(c)(2), 84 Stat. 1694, 1705, 1713 (1970) 17

CONGRESSIONAL MATERIALS CITED

H.R. Rep. No. 728, 90th Cong., 1st Sess. (1967) 16

S.111, 96th Cong., 1st Sess. (1979) 26

125 Cong. Rec. S12171-72 (1979) 26

MISCELLANEOUS SOURCES CITED

43 Fed. Reg. 32182 (1978) ..... *passim*

45 Fed. Reg. 4136 (1980) 12

ABA, Commission on Law and the Economy, *Federal Regulation: Roads to Reform* (Dec. 1979) 20

K. Davis, *Administrative Law Treatise* (1958) 24

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GENERAL MOTORS CORPORATION, et al., *Petitioners,*

v.

DOUGLAS M. COSTLE, Administrator of the Environmental Protection Agency, ENVIRONMENTAL PROTECTION AGENCY, AND STATE OF CALIFORNIA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered below in the consolidated proceedings on the petitions for review.[1]

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[1] The petitioners, and the respective docket numbers of their petitions below, are: General Motors Corporation (CA No. 78-1944); Chrysler Corporation (CA No. 78-1943); Motor and Equipment Manufacturers Association (CA No. 78-1896); Automobile Importers of America, Inc. (intervenor below); and Automotive Service Industry Association, along with Tomadur Engine Company, Central Automotive Wholesale Company, Benson & Zimmerman Co., Inc., Safeguard Automotive Corp., Del Wright D/B/A Palisades Garage, and John Heyler D/B/A Heyler Automotive (CA No. 78-1901).

OPINIONS BELOW

The decision of the Administrator of the Environmental Protection Agency ("EPA") appears at 43 Fed. Reg. 32182 (1978). A subsequent modifying letter is not reported. The opinion of the Court of Appeals is not yet reported. Copies of these documents appear in the Appendix hereto. App. at 73a, 86a, 1a.

JURISDICTION

The jurisdiction of the Court of Appeals was invoked pursuant to Section 307 of the Clean Air Act, 42 U.S.C. § 7607. The judgment of the Court of Appeals was entered on August 3, 1979. A timely joint petition for rehearing and suggestion for rehearing *en banc* was denied on September 17, 1979. On December 14, 1979, Mr. Chief Justice Burger granted petitioners' timely joint application to extend the time to file a petition for a writ of certiorari until February 14, 1980. Copies of the referenced orders appear in the Appendix hereto. App. at 70a, 71a, 72a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Clean Air Act ("Act") expressly preempts state regulations governing air pollutants from new motor vehicles. But with respect to the State of California, Congress established a scheme under which California may apply to the EPA Administrator to conduct a hearing and thereafter to waive the Act's preemption for California regulations. Considering itself bound to adopt EPA's construction of the Act, the court below held, however, that EPA's waiver review is to be "largely ministerial" and that EPA may not consider the impact of a waiver of preemption on, *inter alia,* air quality, automobile safety, or constitutional rights. Therefore the questions presented are:

1. Did the court below err by expressly endorsing the EPA Administrator's role in a waiver proceeding as "largely ministerial," thereby allowing the Administrator to "rubber stamp"

this and other waiver applications, contrary to the Act and the fundamental principles of administrative law requiring agencies affirmatively to protect federal interests confided to their care by Congress?

2. Did the court below err by sanctioning the EPA Administrator's refusal to consider whether the restrictions imposed by California's motor vehicle maintenance regulations will degrade air quality, adversely affect the "public health and welfare," compromise automobile safety, restrain competition, and unconstitutionally restrict commercial free speech?

3. Did the court below err by concluding that the waiver and California's regulations do not violate free speech rights even though the regulations severely restrict manufacturers' dissemination of essential motor vehicle maintenance information to the consumer?

4. Did the court below err by holding that petitioners must show by "clear and convincing evidence" that the EPA Administrator's statutory interpretations are not only *erroneous* but also "*unreasonable*"?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

First and Fourteenth Amendments to the United States Constitution, App. at 88a.

Section 207(a), 42 U.S.C. § 7541(a), App. at 88a, which requires manufacturers to warrant that emissions control systems of new motor vehicles will be defect free for five years or 50,000 miles, whichever comes first.

Section 207(c), 42 U.S.C. § 7541(c), App. at 90a, which requires manufacturers to provide "proper" maintenance instructions for the care of emissions control systems and authorizes the Administrator to order the recall of vehicles that exceed emissions standards although properly maintained and used.

Section 209(a), 42 U.S.C. § 7543(a), App. at 94a, which preempts state regulation of emissions from new motor vehicles.

Section 209(b), 42 U.S.C. § 7543(b), App. at 94a, which defines the circumstances under which the Administrator may waive federal preemption for California regulations.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners represent a wide cross-section of the automobile industry. The issues here, however, are of equal, if not greater, importance to automobile purchasers, the citizens of California, and the nation's air quality. The Clean Air Act preempts state regulations governing air pollutants from new motor vehicles in Section 209(a). But in certain statutorily defined circumstances, Section 209(b) requires the EPA Administrator to conduct a hearing and empowers him thereafter to waive express federal preemption for California's regulations. Here the EPA Administrator waived federal preemption for California's "in-use maintenance regulations," which prohibit manufacturers from effectively communicating with their customers about the maintenance essential for the proper operation of their automobiles.

This case marks the first judicial construction of the Administrator's responsibilities under Section 209(b). It raises important questions of statutory interpretation about Section 209(b)—particularly, whether the Administrator has an affirmative obligation in waiver proceedings to protect and preserve certain federal policies set forth in the Act. Also at issue is an important constitutional question—whether the court below wrongfully upheld the waiver for California's regulations even though they substantially interfere with automakers' free speech rights to inform customers about proper and lawful preventive maintenance and with consumers' interest in receiving such information in a useful and factual manner. Finally, the case raises the fundamental issue whether the court below met its duty to inquire independently into the meaning of Section 209(b) when it held it must defer to EPA's statutory construction unless private petitioners demonstrate by "clear and convincing" evidence that the agency's construction is "unreasonable."

B. Proceedings Below

Section 203 of the Act, 42 U.S.C. § 7522, provides that an automaker may not sell a new vehicle unless it certifies and warrants that the vehicle model will comply with applicable emissions control standards for five years or 50,000 miles, whichever comes first. The manufacturer bases its certification on the results of "certification testing," in which prototype vehicles are operated almost continuously for 50,000 miles over a period of approximately four months to determine whether a particular engine family meets applicable emissions standards. *See* Act §§ 202, 203, 206, 207, 42 U.S.C. §§ 7521, 7522, 7525, 7541. To enhance the predictive value of certification testing, EPA and California have limited the amount of vehicle maintenance that manufacturers may perform during such testing. In this case, however, California has sought to transfer such certification maintenance limitations willy-nilly into the entirely different area of the *in-use* maintenance instructions that automakers give to the millions of individual drivers who operate their cars under countless different conditions over the five-year period. This regulatory escapade suppresses essential communications between manufacturers and customers, threatens consumers' safe, economical, and pollution-free enjoyment of their cars, and is expected to increase the warranty burden imposed on manufacturers far beyond what Congress intended.

The purchaser of a new automobile receives from the manufacturer an owner's manual, in-use maintenance schedules, or both. These documents specify the maintenance operations that the automaker believes necessary for safe operation of the vehicle, emissions control, fuel economy, vehicle durability, and generally satisfactory vehicle performance. (J.A. 1287, 3312-16.)[2] Studies have shown that routine and proper maintenance operations contribute substantially to clean air because emissions from properly maintained vehicles are well below both existing federal emissions standards and the more stringent

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[2] References to "J.A." are to the Joint Appendix in the Court of Appeals.

California emissions standards for which the Administrator has granted waivers of federal preemption. (J.A. 102-03, 1024, 1027, 1799, 2863-64.) Congress recognized this fact in Section 207(c)(3) of the Act, 42 U.S.C. § 7541(c)(3), which requires manufacturers to furnish maintenance instructions for emissions control components. In addition, consumers are "responsible in the proper maintenance of such vehicle or engine to replace and to maintain, at [their] expense at any service establishment or facility of [their] choosing, such items as spark plugs, points, condensers, and any other part, item, or device related to emission control." Act § 207(g), 42 U.S.C. § 7541(g). Section 207 further provides that the consumer's failure to perform such maintenance is a defense to the manufacturer's liability under statutory emissions warranties imposed by Section 207.[3]

California Regulatory Proceedings. Despite the congressional mandate for in-use maintenance instructions, California launched a broad attack on such instructions. On May 26, 1977, California promulgated its initial in-use maintenance regulations. These regulations provided that automakers' maintenance instructions could recommend to consumers no more than nine discrete maintenance operations for the first 50,000 miles of a car's life. App. at 96a-99a. That list was developed for certification testing maintenance and then simply transposed to the context of in-use maintenance on the basis of the "gut feeling" of a member of the staff of California's Air Resources Board ("ARB"), not based upon any evidence, that restrictions on the number of in-use maintenance recommendations would improve emissions performance. The ARB staff reasoned that if owners did not bring their vehicles in for maintenance, mechanics could not deliberately tamper with, or accidentally maladjust, emissions controls and thereby cause higher emissions levels. (J.A. A99; *see* J.A. 104, 109, 2760-61.)

[3] Section 207(a) provides that manufacturers of new motor vehicles must warrant that each vehicle is "free from defects in materials and workmanship" and designed to meet applicable emissions standards. This defect warranty extends for the vehicle's "useful life," defined by Section 202(d), 42 U.S.C. § 7521(d), to be 5 years or 50,000 miles, whichever comes first. In addition, Section 207(c)(1) requires manufacturers to recall vehicles if the Administrator determines that such vehicles do not comply with emissions standards even though maintenance instructions have been followed.

The nine maintenance operations originally permitted to be recommended are shown graphically *infra* at 30-31. The maintenance that petitioner General Motors believes is necessary, specifies in the other 49 states, and would otherwise have specified in California is shown graphically *infra* at 28-29. California's regulations were the first incursion of state or federal regulations into the field of in-use maintenance instructions. These procrustean regulations severely limited the strategies that automakers may pursue to meet emissions standards, for the regulations disregard variations between different kinds of engine families and emissions hardware, variations that dictate different maintenance patterns. (J.A. 105, 108, 140, 1284, 3420-21, 3430-31, 3468.) They also rearrange the balance that Congress struck in Section 207 of the Act, increasing dramatically manufacturers' liability exposure under the statutory warranties and substantially reducing the maintenance obligations of consumers. *See supra* at 6 & n.3. Moreover, given the diversity of environmental conditions and driver habits encountered over 50,000 miles of usage and five years of life, manufacturers strongly believed, on the basis of engineering and field experience, that considerably more maintenance is necessary to ensure adequate emissions control, safety, fuel economy, durability, and the like. (J.A. 1300, 1303-05, 2890-91, 3008-13, 3312-20.)[4]

[4] For competitive reasons, automobile manufacturers have every incentive to reduce maintenance intervals to the minimum amount possible and in fact have reduced scheduled maintenance substantially over the past decade. (J.A. 2892-93, 3306-10.) Nonetheless, automakers believed that the regulations did not allow them to specify enough maintenance, especially since maintenance could be recommended only on the basis of accumulated mileage, as opposed to elapsed time. Petitioners presented evidence concerning the need to make alternative maintenance recommendations based on accumulated mileage or elapsed time because real-life driving differs

Proceedings Before the Administrator. California applied under Section 209(b) for a waiver of federal preemption. To qualify for a waiver, California must first determine unequivocally that its "State standards *will be,* in the aggregate, at least as protective of public health and welfare as applicable Federal standards." (Emphasis added.)[5] To ensure that California properly discharges that responsibility, the Administrator must conduct a public hearing on every waiver request. He is to deny a waiver if he finds that (1) California's "will be . . . as protective" determination is arbitrary and capricious, (2) California does not need the proposed standards to meet extraordinary conditions, or (3) the state standards or accompanying enforcement procedures are technologically infeasible, taking into consideration the cost of compliance. *See* Act § 209(b), Subparagraphs (A)-(C).

The Administrator granted California's waiver request, in an opinion that eviscerated the statutory tests and transformed the hearing process, set forth in the statute, into a hollow formality. Because the lower court's erroneous acquiescence in the Administrator's statutory interpretations is a central issue in this case, those interpretations are set forth below:

(1) As the Administrator read Section 209(b), he has no authority to require that California justify, or even explain, its waiver request or to inquire into the record to ensure that the policies of the Act are protected.[6] In his view, his sole obligation

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from certification testing. (J.A. 1305, 3312-13.) That evidence was never even addressed by California, EPA, or the reviewing court. Manufacturer petitioners are left to wonder if the only adequate proof of their contention would be to run a whole fleet of cars for five years under widely diverse operating conditions.

[5] The Act ordinarily requires far less categorical findings of fact. *See, e.g.,* § 202(a)(1), (b)(6)(A)(ii), 42 U.S.C. § 7521(a)(1), (b)(6)(A)(ii).

[6] The Administrator stated, "[T]he manufacturer has the burden of demonstrating the existence of grounds upon which, under the criteria enumerated in section 209(b), I must deny a waiver request." 43 Fed. Reg. at 32184, App. at 80a (footnote omitted); *see id.* at 32182-83, App. at 73a-74a, 76a.

under Section 209(b) is to adjudicate when private parties interpose the very narrow range of objections that he deems relevant in a Section 209(b) proceeding. Thus, as stated in the Government's brief to the court below, "the Administrator must grant a waiver for any unopposed request. . . ," regardless of the state of the record or the consequences for air quality and other national interests protected by the Act. EPA Br. at 44. And even when a private party objects that the regulations will adversely affect the "public health and welfare," the Administrator persists in his passive, if not negative, role. He presumes the validity of California's application, even if unexplained and unsupported by the record, and will deny a waiver only if opposing private parties demonstrate to him that "clear and compelling" grounds exist on which the waiver should be denied. 43 Fed. Reg. at 32183, App. at 76a. Moreover, because of his excessively narrow construction of the statutory tests, *see infra* paragraphs (2)-(4), he will ignore altogether much of the evidence presented by such parties, thereby making it impossible for opponents to make the showing he requires of them.

(2) Even though private parties introduced evidence that California's regulations *adversely affect air quality* (J.A. 1281-82, 1803-06, 3312-13, 3413), the Administrator dismissed such evidence as "beyond [his] narrow scope of review" under Section 209(b)(1)(A)'s "arbitrary and capricious" test. 43 Fed. Reg. at 32184 & n.41, App. at 81a-82a. In so doing, the Administrator did not explain how he can perform his statutory duty to evalutate the reasonableness of California's "will be . . . as protective" determination without considering the effect of the underlying regulations on air quality.

(3) The Administrator refused altogether to consider, under Section 209(b)(1)(B), whether California "needed" its in-use maintenance regulations "to meet compelling and extraordinary conditions" in the state, despite the evidence that the restrictions would degrade air quality. He said that regardless of the potential effect on air quality, the Subparagraph (B) "need" test is inapplicable to "accompanying enforcement procedures," which he defined, without any statutory basis, to in-

clude all regulations other than numerical emissions standards (*e.g.*, 3.4 grams of carbon monoxide per mile). *Id.* at 32182, App. at 74a.[7]

(4) The Administrator refused to consider evidence pertaining to the effect of the in-use maintenance regulations on other "public health and welfare" concerns which the Act would require the Administrator to consider in promulgating federal regulations (including automobile safety, fuel efficiency, cost to the consumer, and preservation of competition in the automotive industry). Similarly, he dismissed, as beyond the scope of his authority, petitioners' constitutional contentions that California's regulations violated manufacturers' and consumers' First Amendment interests and denied manufacturers a federally-prescribed defense against warranty claims. *Id.* at 32184-85, App. at 82a, 83a-84a.

The Administrator's opinion is thus a litany of unfounded statutory interpretations that allow him to avoid any independent search of the record and prevent him from even considering material evidence and legal concerns presented by petitioners.

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[7] The court below sustained the statutory revisionism inherent in the Administrator's holding that when a regulation other than a numerical standard is proposed for waiver, he may consider only two questions: (1) whether the enforcement procedure is so lax that it undermines the validity of the "will be. . .as protective" determination for California's numerical standards, and (2) whether the enforcement procedures are technologically feasible. He thus applies only the Subparagraph (C) test and a modified version of the Subparagraph (A) test to any regulation categorized as an "accompanying enforcement procedure." This formulation allows him to ignore the need for such "enforcement procedures" under Subparagraph (B) and to ignore the direct impact of such "enforcement procedures" on air quality under Subparagraph (A). For all practical purposes these holdings of the court will supplant the express statutory tests of Section 209(b) in future waiver proceedings because California has established, and the Administrator has waived, numerical standards applicable through 1985. For the foreseeable future, as here, regulatory efforts will be to supplement those numerical standards with further regulations.

Amendment of the Regulations. Pursuant to Section 307 of the Act, 42 U.S.C. § 7607, petitioners then sought judicial review of the Administrator's action.[8] But after petitioners filed their opening brief, California, in a last ditch effort to save its scheme, *sua sponte* adopted emergency amendments to the in-use maintenance regulations. Those amendments continue to restrict manufacturers from effectively communicating what maintenance is required for proper operation of the vehicle and therefore is an appropriate prerequisite to warranty obligations under Section 207(a). While the amended regulations provide that manufacturers may "recommend" additional maintenance, automakers may "require" performance of only the original list of nine discrete maintenance operations. (J.A. A112.) And only "required" maintenance may be made a prerequisite to the manufacturers' obligation to honor statutory warranties for emissions parts. (J.A. A117-18.) This hastily contrived distinction between "required" and "recommended" maintenance instructions, unprecedented in industry custom or government regulations, can easily confuse car owners and prevents automakers from effectively disseminating information protected by the First Amendment. It also destroys completely the initial rationale underlying California's decision—that restrictions on recommended maintenance would reduce opportunities for tampering and improper maintenance. *See supra* at 7. California sought to rationalize this contradiction by contending that consumers will ignore mere "recommendations." (J.A. A119.) Moreover, the amendments make it crystal clear that California has set out to readjust the congressionally mandated balance between maintenance instructions and warranty requirements.[9]

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[8] Petitioner Automobile Importers of America, Inc. was allowed to intervene in support of the other automotive industry petitioners below. Respondent State of California was allowed to intervene in support of the federal respondents below.

[9] As numerical emissions standards have become more stringent over the years, new and more sophisticated emissions hardware has been developed. Common sense suggests that the need for preventive maintenance increases as technology becomes more sophisticated.

California's abrupt administrative flip-flop exposes the shallowness and fickleness of its entire regulatory approach. This is precisely the kind of ill-considered state action that Congress sought to guard against by providing for EPA review of California waiver requests. But despite these new alarm signals, EPA simply ruled by letter that the amended regulations "fall within the scope" of the original waiver. App. at 86a.

Decision of the Court Below. The central theme of petitioners' case in the court below was that the Administrator abdicated his statutory responsibilities through erroneous constructions of Section 209(b). However, starting from the premise that the Administrator's statutory interpretations must be upheld unless there is "clear and convincing evidence" that they are "unreasonable," slip op., App. at 17a, the court acquiesced in each of the Administrator's erroneous interpretations.

First, the court agreed, the Administrator's review is to be "largely ministerial," and California's waiver applications "are presumed to satisfy the waiver requirements and . . . the burden of proving otherwise is on whoever attacks them." *Id.*, App. at 49a, 55a n.56. In a companion case the court below stated that the Administrator's Section 209(b) review is to be "cursory." *Ford Motor Co. v. EPA,* No. 78-1791, at 21 (Aug. 17, 1979). Second, the court confirmed, EPA is prohibited from even considering the actual effect of the regulations on air quality, even though the court candidly acknowledged that the regulations might adversely affect air quality. Slip op., App. at 56a-58a. Third, the court concurred, the Administrator must ignore altogether the Section 209(b)(1)(B) test concerning California's "need" for in-use maintenance regulations. *Id.*, App. at 29a-35a. Fourth, the court agreed, Section 209(b) does not permit consideration of federal policies other than pollution control even though such policies (*e.g.*, competition) are embraced in the Act and would be germane to the Administrator's own rulemaking proceedings. *Id.*, App. at 38a-48a. Similarly, the court agreed that the Administrator "operates in a narrowly circumscribed proceeding requiring no broad policy judgments on constitutionally sensitive matters." *Id.*, App. at 36a. Moreover, the court summarily dismissed petitioners' constitutional contentions with the observation that the regulations were rationally related to a legitimate interest of the state. *Id.*, App. at 63a-65a.

(J.A. 1284, 3420-21, 3430-31, 3468.) Yet California asks manufacturers simultaneously to reduce maintenance requirements and to develop—and warrant—more sophisticated technology. At present that warranty extends for 5 years or 50,000 miles. *See supra* at note 3. But in a recent rulemaking EPA elongated the "useful life" over which automakers must warrant the emissions performance of heavy-duty engines. *See* 45 Fed. Reg. 4136, 4139-40 (1980). Manufacturers must now fear that California may elongate the "useful life" definition for passenger cars, thereby further complicating the problem of improving performance while reducing maintenance.

REASONS FOR GRANTING THE WRIT

The court below acceded to the Administrator's abdication of his statutory and constitutional responsibilities in Section 209(b) proceedings, rather than taking a hard and independent look at that abdication in the context of the policies intended to be protected by the Act. The court further upheld the waiver despite the infringement of the free speech rights of automakers and customers. The review of this Court is needed to overturn the lower court's undue deference to the Administrator's interpretations and its contravention of constitutional principles, to interpret properly Section 209(b), and to direct the conduct of further proceedings in conformity with the Act.

The case primarily involves the proper statutory interpretation of a novel experiment in federal preemption. If Congress had completely trusted California's judgment in promulgating its own emissions regulations, it simply would have exempted California from the preemptive effect of Section 209(a). Instead Congress set up an elaborate mechanism for EPA review. Contrary to established precedent on administrative proceedings, the court below has allowed the Administrator to act as a virtual bystander in a waiver proceeding, rather than requiring him to act as an administrative officer who must painstakingly assess

evidence and dig into the facts to determine whether congressional and constitutional policies are being advanced. The Administrator did not embark on such an inquiry because he believed he lacked the power under the Act to do so. Thus, the erroneous framework for Section 209(b) proceedings tolerated by the court below has fundamentally distorted the Administrator's waiver proceedings. Review by this Court is required to establish the Administrator's obligation under Section 209(b) to examine the record, to consider relevant evidence, and to make a meaningful inquiry into the effect of California's actions on air quality and other relevant federal statutory and constitutional policies.

The seeds for the lower court's errors of statutory interpretation were sown by the court's completely uncritical deference to the Administrator's untenable statutory interpretations. The lower court's abject deference to the Administrator's abdication of statutory responsibility is fundamentally contrary to principles previously announced by this Court. But the error of the court below underscores the need for this Court to clarify the law in this area of delicate interface between Congress, agencies, and the courts. This Court's review is also required to clarify the application of free speech principles to communications between automakers and their customers. Those communications are vital to consumers, are recognized by Congress in Section 207(c)(3) as essential to the policies of the Act, and are an integral aid to automakers in discharging their duty to certify and warrant that cars will meet emissions standards for five years or 50,000 miles. In fact, Congress has made such communications an essential part of manufacturers' statutory obligations by providing that an owner's failure to perform specified maintenance is a defense to an automaker's warranty and recall liability.

Left unchanged, the opinion of the court below will have serious implications for constitutional policies and the policies of the Act. California itself is a major market for new motor vehicles. Moreover, Section 177 of the Act, 42 U.S.C. § 7507, as amended in 1977, allows any other state that has not yet attained compliance with national air quality standards to "adopt

and enforce," *without further federal review,* California standards which have been waived by the Administrator. Thus, waiver proceedings for California regulations have the potential significantly to effect national ambient air quality and other important national interests, among which are free speech, automobile safety, energy conservation, the economic interests of individual consumers, and the continued economic viability of the automobile industry—including both manufacturers and suppliers of parts and services (the "aftermarket").

I. BY ACQUIESCING IN THE ADMINISTRATOR'S "MINISTERIAL" REVIEW, THE COURT BELOW SUBVERTED JUDICIAL PRECEDENT COMMANDING THAT THE ADMINISTRATOR AFFIRMATIVELY PROTECT NATIONAL POLICIES RECOGNIZED BY THE ACT.

The court below tolerated fundamentally distorted waiver proceedings. It agreed with the Administrator that his review is to be "largely ministerial," so that he must grant unopposed waivers and, in any event, may "sit back, 'like an umpire, and [merely] resolve adversary contentions,'" the ventilation of which depends solely "'upon the assiduousness' of private parties." Slip. op., App. at 55a n.56. To reach such conclusions, the court below disregarded the language of the Act, as well as its own precedents and those of other courts forbidding agencies to act like "umpires" and rely solely upon the "assiduousness" of private parties.[10]

By requiring a hearing and commanding that waivers be denied in statutorily defined circumstances, Congress has charged

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[10] *See Citizens Committee to Save WEFM v. FCC,* 506 F.2d 246, 262 n. 21 (D.C. Cir. 1974); *Brennan v. Occupational Safety & Health Review Commission,* 492 F.2d 1027, 1032 (2d Cir. 1974); *Greene County Planning Board v. FPC,* 455 F.2d 412, 420 (2d Cir.),*cert. denied,* 409 U.S. 847 (1972); *Moss v. CAB,* 430 F.2d 891, 893, 900 (D.C. Cir. 1970); *Office of Communication of the United Church of Christ v. FCC,* 425 F.2d 543, 546-48 (D.C. Cir. 1969).

the Administrator to represent and protect certain national interests. In such contexts, the courts have always held that administrative processes are designed to vindicate public policy, not simply to adjudicate among adversaries, and that agencies cannot leave to private parties the initiative to protect public policy. *See* the cases cited in the preceding footnote. Until the holding below, such a rule was thought to be imperative because there is no guarantee that some private party will always have the incentive, the knowledge, and the economic and other resources to intervene and show the adverse effects of a proposed action on the public policies intended to be protected by an agency. *Calvert Cliffs' Coordinating Committee v. AEC,* 449 F.2d 1109, 1119 (D.C. Cir. 1971). Fully aware of the need for a public guardian, Congress required review by the Administrator but nowhere assigned a role to private opponents of waiver requests, much less placed upon them the sole responsibility to police California's waiver requests.[11]

The most striking instance of the Administrator's pervasive abdication of responsibility, and of the court's sweeping tolerance thereof, involves the inexplicable conclusion that the Administrator need not and cannot consider what effect regulations proposed for waiver will have on air quality. *See supra* at 9-10, 12-13. When waiver is opposed by a private party under Section 209(b)(1)(A), the court below held, the Administrator is to consider only whether California's "determination" concerning air quality was "arbitrary and capricious," without considering the actual effect of the regulations themselves on air quality. *See supra* at 9,12. Under Section 209(b)(1)(B), the court insists, it is not relevant whether a regulation is needed to benefit air quality unless that regulation is a numerical emissions standard, as opposed to an "accompanying enforcement procedure." *See supra* at 9-10, 12-13. Yet how can the Administrator

[11] The most salient legislative history on this question appears in the House Report accompanying enactment of the Administrator's waiver authority. It reads, simply: "[Under Section 209(b) t]he burden would be on *the Secretary [of HEW, now the Administrator]* to show why California. . .should not be allowed to go beyond the Federal limitations in adopting and enforcing its own standards." H.R. Rep. No. 728, 90th Cong., 1st Sess. 96 (1967) (emphasis added).

evaluate California's "determination" without a probing inquiry into the real-world effect of the regulations? How can the Administrator conclude or a court agree that Congress intended waiver to be granted for regulations that will adversely affect air quality simply because those regulations are unopposed or are conveniently pigeonholed as "accompanying enforcement procedures"?

The lower court's tolerance for the Administrator's lack of diligence was especially egregious here because petitioners offered evidence that California's regulations would adversely affect air quality. *See supra* at 9. In fact, EPA conceded that there was evidence of adverse effects on air quality. EPA Br. at 54. Even California admitted that it could not estimate any potential beneficial effect on air quality from the regulations alone. (J.A. 144-45.)[12] And the court below conceded that

[12] The Administrator, of course, never questioned whether California had adequately disclosed the basis for its determination, *Kennecott Copper Corp. v. EPA,* 462 F.2d 846, 849 (D.C. Cir. 1972), even though California's "will be. . .as protective" determination was made many months after it adopted the in-use maintenance regulations and on a record containing no evidence on the issue.

Prior to August 1977, Section 209(b) imposed no factfinding duty on California comparable to its present obligation to make an unequivocal "will be. . .as protective" determination. California's in-use maintenance regulations were adopted under that version of Section 209(b), when all factfinding resided with the Administrator. *See* Pub. L. No. 90-148, § 22, 81 Stat. 501 (1967), *renumbered and amended,* Pub. L. No. 91-604, §§ 8(a), 11(a)(2)(A), 15(c)(2), 84 Stat. 1694, 1705, 1713 (1970). In August 1977, while this waiver application was pending, Congress amended Section 209(b), delegating to California the responsibility to determine that its regulations will be as protective of the "public health and welfare" as applicable federal regulations, subject to the Administrator's review. Because the 1977 amendments applied to pending waiver proceedings, the ARB passed a *pro forma,* omnibus resolution on September 30, 1977, purporting to make the required determination for all regulations pending waiver. (J.A. 276-80.) However, the "will be. . .as protective" determination for the in-use maintenance regulations was not supported by evidence or analysis. Nonetheless, neither the Administrator nor the court below expressed any interest in whether California had in fact discharged its specific responsibility under the Act or had simply gone through the motions.

"[t]here is certainly room for disagreement about the potential benefits of the in-use maintenance regulations." Slip. op., App. at 57a. Petitioners are not the federal guardian of air quality, commissioned, dedicated, and equipped to understand the sometimes ellusive effects of emissions regulations on air quality—the Administrator is. Had the Administrator himself probed the record after being alerted to potential problems, he might have found even more such evidence. The lower court's tolerance of the Administrator's refusal to even consider such evidence was in stark conflict with this Court's command in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971), directing agencies to investigate all relevant factors. Likewise, his failure, with the court's acquiescence, to search the record for any rational basis to support California's determination was contrary to this Court's holding in *Bowman Transportation, Inc. v. Arkansas-Best Freight System,* 419 U.S. 281, 285 (1974), directing agencies and reviewing courts to probe the facts thoroughly to determine whether there is any rational connection to the decision made.[13]

II. THE COURT BELOW ERRONEOUSLY UPHELD THE ADMINISTRATOR'S REFUSAL TO CONSIDER THE EFFECT OF PROPOSED WAIVERS ON SUCH STATUTORILY RELEVANT POLICIES AS "PUBLIC HEALTH AND WELFARE," AUTOMOBILE SAFETY, AND COMPETITION.

The court below not only sanctioned the Administrator's indifferent attitude toward the protection of air quality, it also acquiesced in the Administrator's refusal to consider the impact of California's regulations on other national values, including

[13] The Administrator and the court below thus conspired in creating a process that runs afoul of the Act's long recognized requirements for procedural integrity and reasoned decisionmaking. *See, e.g., South Terminal Corp. v. EPA,* 504 F.2d 646 (1st Cir. 1974); *Essex Chemical Corp. v. Ruckelshaus,* 486 F.2d 427 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 969 (1974); *International Harvester Co. v. Ruckelshaus,* 478 F.2d 615 (D.C. Cir. 1973).

automobile safety, fuel economy, and the economic welfare of various segments of the automotive industry, the protection and enhancement of which are required by the Act. *See, e.g.,* §§ 202(a)(2), (4), 207(c)(3), 317(a), (c), 42 U.S.C. §§ 7521(a)(2), (4), 7541(c)(3), 7617(a), (c).[14] The court below thus condoned a narrow categorical approach to regulatory decisionmaking, contrary to Section 209(b), the policies of the Act, and judicial precedent.

Congress has required EPA to take a broad view of regulatory impacts when it regulates new motor vehicle emissions in the 49 states other than California. *See* the authorities just cited. And Section 209(b) shows that Congress intended California to do the same, subject to EPA review. California is to make, and the Administrator is to review, a determination that its standards "will be . . . as protective" as federal standards of the "public health and welfare." The latter is defined to include, in part, "damage to and deterioration of property, . . . hazards to transportation, . . .[and] effects on economic values." Act § 302(h), 42 U.S.C. § 7602(h). Section 209(b) thus fully authorizes—indeed, directs—the Administrator to inquire into the effects of the proposed waiver on national values other than air quality embraced within the Act.

The court below acquiesced in the Administrator's contention that the phrase "public health and welfare" embraces only

[14] Section 202(a)(4) requires, *inter alia,* that emissions standards be consistent with automotive safety. Section 207(c)(3) requires that the statutorily required maintenance instructions leave intact the competition between manufacturers and the aftermarket to provide goods and services. Sections 202(a)(2) and 317(a), (c) require that EPA consider, *inter alia,* the cost of complying with a regulation and the effects of a regulation on consumer costs and energy use. The court below, noting that Section 209 also evidences the strong congressional interest in the economic welfare of the automobile industry, found that Congress had preempted state emissions regulations to prevent "the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers." Slip. op., App. at 24a (footnote omitted).

those aspects of the public interest directly affected by air pollution (*e.g.*, health), not public interests adversely affected by *regulation* of pollution (*e.g.*, competition in the automobile industry). Slip op., App. at 38a-48a; 43 Fed. Reg. at 32184, App. at 82a; EPA Br. at 74-79. But at this crucial juncture of our history, neither an administrator nor a court should lightly conclude that Congress intended an agency to pursue its special mandate oblivious to the consequences for competing national priorities. *See* ABA Commission on Law and the Economy, *Federal Regulation: Roads to Reform* 68-91 (Dec. 1979). Such rigid "tunnel vision" perverts congressional intent by destroying the flexibility and informed discretion that Congress seeks in the administrative process. It is nowhere more dangerous than in regulation of the automobile industry—where competing national goals of air quality, automobile safety, energy conservation, economic stability of the automobile industry, and preservation of competition (both among manufacturers and between manufacturers and the aftermarket) all claim a high priority.

Absent an explicit congressional prohibition, the court below should have presumed some limited discretion to consider other affected policies, *see Richmond Power & Light v. FERC*, 574 F.2d 610, 616 n.22 (D.C. Cir. 1978),[15] even if Congress had not explicitly provided such authority by incorporating the "public health and welfare" test in Section 209(b), by defining that test broadly in Section 302(h), and by indicating its interest in such policies in the statutory provisions cited above. The

[15] This Court has specifically held that competitive considerations are relevant to a broad range of administrative proceedings. *See, e.g., Gulf State Utilities Co. v. FPC*, 411 U.S. 747 (1973); *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968). Here the aftermarket petitioners contended that the regulations in question would reduce the business available to them because more maintenance would be performed under warranty. The court below, however, held that neither the Administrator nor it was required to consider these claims of anti-competitive impact in Section 209(b) proceedings, despite the court's recognition of congressional concern over this issue. Slip. op., App. at 47a.

court's obsessively narrow decision seems particularly inappropriate when Congress is debating radical solutions to the severe problem of costly, single-purpose regulations (*e.g.*, one House vetoes of agency regulations, a burden of proof on agencies to demonstrate the lawfulness of agency action, etc.).

III. THE COURT BELOW ERRED BY ALLOWING THE ADMINISTRATOR TO IGNORE FIRST AMENDMENT RIGHTS AND BY UPHOLDING THE CONSTITUTIONALITY OF THE REGULATIONS CONTRARY TO THIS COURT'S MANDATE IN *VIRGINIA STATE BOARD.*

Petitioners contended at the Administrator's hearing that California's regulations were illegal and thus could not be waived by the Administrator because they restricted constitutionally protected free speech by forbidding manufacturers from recommending to the consumer concededly lawful maintenance. Leaving emissions control aside, petitioners wanted to inform customers that such maintenance was necessary for safety, fuel economy, and overall satisfactory vehicle performance. *See supra* at 5 - 7. Customers desire and depend upon such assistance. In addition, Section 207(c)(3) requires that automakers provide "proper" instructions for the in-use maintenance of emissions control equipment. All these communication interests of automakers and consumers are constitutionally protected. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The court below nonetheless sustained the Administrator's refusal to consider constitutional contentions on the ground that he "operates in a narrowly circumscribed proceeding." *See supra* at 13. Such precedent is mischievous; it also conflicts with decisions in other circuits.[16] In *SEC v. Wall Street Transcript*

[16] The Administrator's refusal to consider constitutional issues cannot be defended on the ground that an administrative agency may not hold unconstitutional the very act administered by it. *See Engineers Public Service Co. v. SEC*, 138 F.2d 936, 953 (D.C. Cir. 1943), *vacated on other grounds*, 332 U.S. 788 (1947). Here the petitioners did not

Corp., 422 F.2d 1371, 1380 (2d Cir.), *cert. denied,* 398 U.S. 958 (1970), for example, the court held that First Amendment values must be recognized in SEC investigations. In *Midwest Video Corp. v. FCC,* 571 F.2d 1025, 1042 (8th Cir.), *aff'd,* 440 U.S. 689 (1978), the court said that "[e]very regulatory agency should have all constitutional 'goals' and restrictions on government in mind in carrying out its duties . . . ." At a minimum, the Administrator's inquiry would have provided important administrative guidance on the factual inquiries relevant to subsequent free speech analysis by the court. *Compare Eisen v. Eastman,* 421 F.2d 560 (2d Cir. 1969), *cert. denied,* 400 U.S. 841 (1970), *with Plano v. Baker,* 504 F.2d 595 (2d Cir. 1974).

The court below also erred in rejecting on the merits petitioners' First and Fourteenth Amendments challenge to waiver of the regulations. The court stated that California's regulations are constitutional if they have "a reasonable basis in a legitimate governmental policy." Slip. op., App. at 64a. Such a rationally-related test, however, was specifically rejected by this Court in *Virginia State Board,* 425 U.S. at 768-69, where this Court stated the correct test as: whether California *needed* its regulations to accomplish a legitimate state interest. *See id.* at 769-70; *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 95 (1977). Moreover, in two other cases this Court has noted probable jurisdiction and will address the justification constitutionally required when a state restricts communications between industry and consumers despite the importance of such communications in our free enterprise economy. *See Consolidated Edison Co. v. Public Service Commission,* No. 79-134, *prob. jur. noted,* 100 S.Ct. 41 (1979); *Central Hudson Gas & Electric Corp. v. Public Service Commission,* No. 79-565, *prob. jur. noted,* 100 S.Ct. 446 (1979). If this Court does not immediately issue the writ of certiorari in order to reverse the court below for its disregard of the standard set forth in *Virginia State*

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challenge the constitutionality of the Act. They simply contended that the unconstitutional regulations proposed by California were invalid and thus did not come within the Administrator's waiver powers.

Board, petitioners respectfully request that the Court hold this case pending further clarification and elaboration of that standard in *Consolidated Edison* and *Central Hudson.*

If the court below had applied the proper test, it would have concluded that the in-use maintenance regulations violate constitutional standards. California has sought to suppress the exchange of legitimate information, thus attempting to solve indirectly a problem that it could have addressed directly without any infringement of speech (*e.g.,* by expanding anti-tampering regulations or vehicle inspection programs). *See Bates v. State Bar of Arizona,* 433 U.S. 350, 363-79 (1977); *Carey v. Population Services International,* 431 U.S. 678, 700-02 (1977); *Linmark Associates, Inc.,* 431 U.S. at 96-97; *Virginia State Board,* 425 U.S. at 769-70. In order to give their customers all relevant information, manufacturers must issue two types of maintenance instructions—those that are "required" and those that are merely "recommended." That duality will undermine consumer confidence in the manufacturers' instructions by telling purchasers that the state believes that the manufacturers are recommending "unnecessary" maintenance. The regulations therefore penalize manufacturers' attempts to communicate important information, contrary to First Amendment principles. *See Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256-58 (1974).

The waiver also will frustrate completely the effectiveness of automakers' communications because the regulations create powerful economic and psychological incentives for the consumer to disregard manufacturers' "recommendations." If a consumer performs "recommended" preventive maintenance to maximize the safe and efficient use of his car, he must pay for it; if he neglects it, the manufacturer may be obliged to pay for the maintenance under the statutory warranties. California itself has stated that consumers will ignore mere "recommendations." (J.A. A119.) Thus, contrary to the Constitution, the regulations will cause manufacturers to lose goodwill and suffer higher warranty expenses, while depriving consumers of valuable information that would enhance the useful-

ness of their automobile investment. *See Bates,* 433 U.S. at 363-64, *Virginia State Board,* 425 U.S. at 769-70.[17]

IV. THE COURT BELOW ADOPTED AN EXTRAORDINARY AND EXCESSIVE STANDARD OF DEFERENCE TO THE ADMINISTRATOR'S STATUTORY INTERPRETATIONS.

This Court has long held that in interpreting statutes, courts should not be oblivious to the statutory interpretations of agencies charged with administering the statute in question. In the myriad of relevant cases, there is no set formulation of the proper degree of judicial deference because courts carefully tailor their decisions to the particular question of statutory interpretation. *See, e.g.,* K. Davis, *Administrative Law Treatise* Ch. 30 (1958). The one enduring principle, however, is that courts retain the final, and independent, responsibility to interpret the statute:

> "[T]he courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown,* 380 U.S. 278, 291. 'The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . .' *American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 318." *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission,* 390 U.S. 261, 272 (1968).

The court below exceeded the limits on a court's deference by announcing a breathtakingly broad standard of deference

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[17] *See also Miami Herald Publishing,* 418 U.S. at 256 (footnote omitted) ("[The] argument that the Florida statute does not amount to a restriction of appellant's right to speak because 'the statute in question here has not prevented the *Miami Herald* from saying anything it wished' begs the core question. Compelling editors or publishers to publish that which ' "reason" tells them should not be published' is what is at issue in this case.")

wholly inappropriate to questions of the kind at issue: "For us to conclude that the Administrator misconstrued section 209 petitioners must show by *clear and convincing evidence* that his construction [of the statutory language] is *unreasonable.*" Slip op., App. at 17a (emphasis added). The court thus elevated the Administrator's interpretations to a pedestal above the plain meaning of the statutory language, congressional intent, and the court's independent interpretation and required petitioners to show that such interpretations were not only erroneous, but also "unreasonable."

Such abject judicial deference is never appropriate, for it is completely inconsistent with administrative subjugation to the congressional will. Under the court's test, the construing agency, not the enacting Congress, determines what the law shall be. And this standard was particularly inappropriate for the issues in this case. Here the Administrator has avowedly sought to play the narrowest role possible under Section 209(b), creating an acute danger that Congress' intent to protect a federal interest will be frustrated. Moreover, the court's deference to that view conflicts with analogous cases where courts have refused to defer to agency interpretations. In *Calvert Cliffs' Coordinating Committee v. AEC,* 449 F.2d 1109 (D.C. Cir. 1971), for example, the AEC promulgated licensing rules under which it would consider certain environmental questions only when raised by private intervenors. The court below brushed aside the AEC's attempted statutory justifications:

> "In recent years, the courts have become increasingly strict in requiring that federal agencies live up to their mandates to consider the public interest. They have become increasingly impatient with agencies which attempt to avoid or dilute their statutorily imposed role as protectors of public interest values beyond the narrow concerns of industries being regulated." *Id.* at 1119 n.21.

In short, until the decision below, the law was that a court could not defer to an agency's self-effacing interpretations of its basic authority when such interpretations threaten the public interest. *See Baltimore & O.R. Co. v. United States,* 386 U.S. 372, 438

n.32 (1967) (Brennan, J., concurring); *see also* the cases cited *supra* at note 10. The lower court's disregard of that principle becries the need for this Court's review.[18]

The lower court's failure to follow its own pronouncement in *Calvert Cliffs'* is especially troublesome because of the unavoidable suspicion that the court deferred to the agency more readily when business interests sought judicial review than when "public interest groups" sought review. *Cf.* the cases cited *supra* at note 10. No principled basis exists to support so much deference in the one case and so little in the other. As Mr. Justice Black once said: "It does not matter who sues, if the court decides an issue of statutory interpretation that decision should remain the same even if the litigants change." *Zuber v. Allen,* 396 U.S. 168, 205 (1969) (dissenting).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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[18] Recently the Senate adopted the Bumpers Amendment, S. 111, 96th Cong. 1st Sess. (1979). *See* 125 Cong. Rec. S12171-72 (1979). It forbids any judicial deference to agency statutory interpretations. The Senate's action is evidence of the growing national concern that decisions such as that below are turning our legislative democracy into a bureaucracy.

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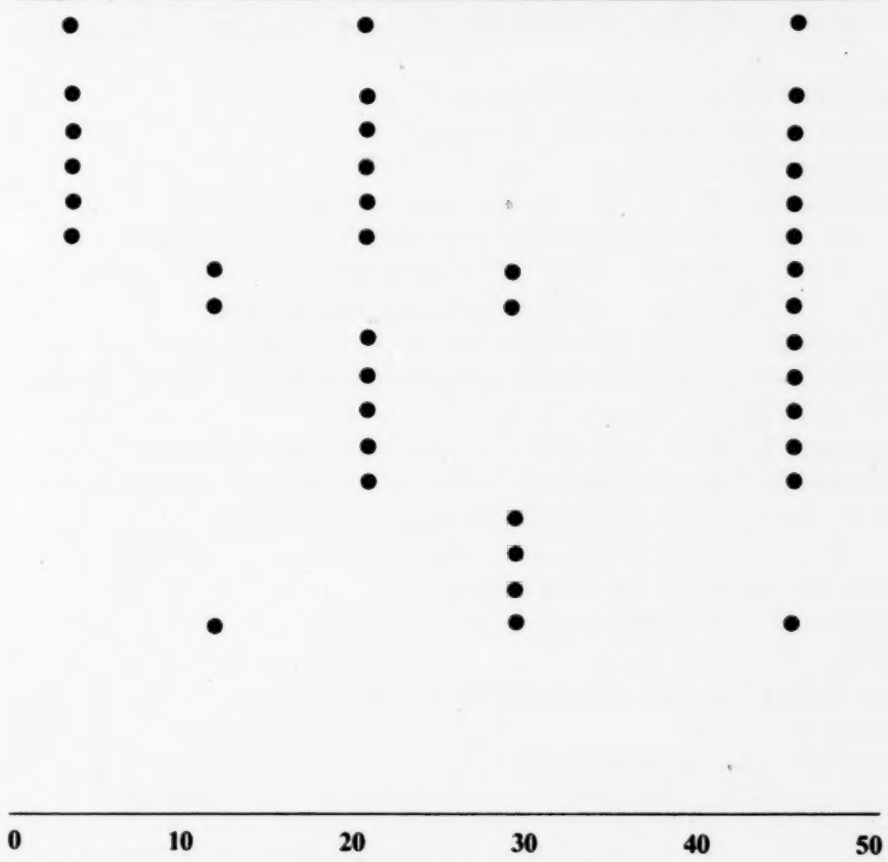
February 14, 1980

TABLE I—MAINTENANCE REQUIREMENTS GENERAL MOTORS WOULD HAVE MADE IN 1980 ABSENT ARB REGULATIONS

DESCRIPTION OF MAINTENANCE*	MAINTENANCE FREQUENCY
THERMOSTATICALLY CONTROLLED AIR CLEANER—Check operation	7,500 Miles, 22,500 Miles, 45,000 Miles
CARBURETOR CHOKE—Check operation and lubrication	7,500 Miles, 22,500 Miles, 45,000 Miles
ENGINE IDLE SPEED ADJUSTMENT	7,500 Miles, 22,500 Miles, 45,000 Miles
EFE SYSTEM—Check operation	7,500 Miles, 22,500 Miles, 45,000 Miles
CARBURETOR—Torque attaching bolts or nuts to manifold	7,500 Miles, 22,500 Miles, 45,000 Miles
VACUUM ADVANCE SYSTEM AND HOSES—Check operation	7,500 Miles, 22,500 Miles, 45,000 Miles
CARBURETOR FUEL INLET FILTER—Replace	15,000 Miles, 30,000 Miles, 45,000 Miles
PCV SYSTEM—See Explanation of Maintenance Schedule	15,000 Miles, 30,000 Miles, 45,000 Miles
SPARK PLUG AND IGNITION COIL WIRES—Inspect and clean	22,500 Miles, 45,000 Miles
IDLE STOP OR SPEED UP SOLENOID OR DASHPOT—Check operation	22,500 Miles, 45,000 Miles
SPARK PLUGS—Replace	22,500 Miles, 45,000 Miles
ENGINE TIMING ADJUSTMENT AND DISTRIBUTOR CHECK	22,500 Miles, 45,000 Miles
CARBURETOR VACUUM BREAK INSPECTION AND ADJUSTMENT	22,500 Miles, 45,000 Miles
ECS SYSTEM—See Explanation of Maintenance Schedule	30,000 Miles
FUEL CAP, TANK AND LINES—Check condition	30,000 Miles
AIR CLEANER ELEMENT—Replace	30,000 Miles
DRIVE BELTS—Check condition and adjustment	30,000 Miles
IGNITION DWELL EXHAUST GAS RECIRCULATION SYSTEM IDLE MIXTURE VALVE LASH ADJUSTMENT CATALYST	NO MAINTENANCE RECOMMENDED

Note: *Based on General Motors Emission Control Maintenance Schedule I.

(J.A. 3320)



Mileage of Vehicles Examined by ARB Staff (12-19K Miles)

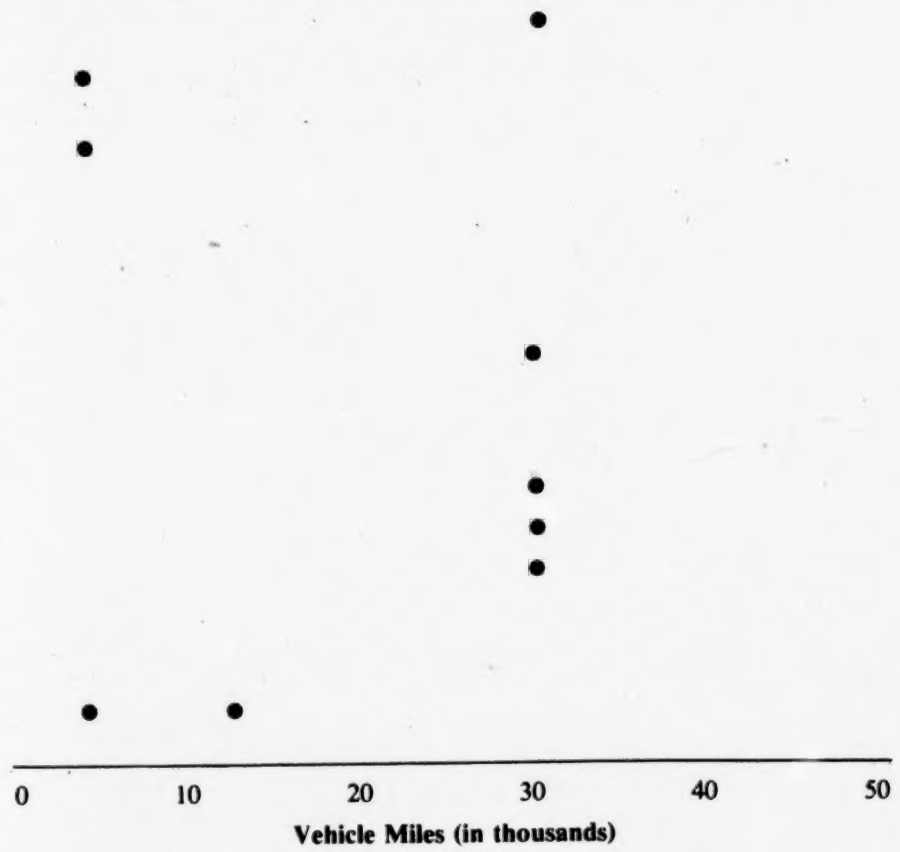
April 1977

TABLE II—MAINTENANCE REQUIREMENTS ALLOWED BY ARB REGULATIONS

DESCRIPTION OF MAINTENANCE
THERMOSTATICALLY CONTROLLED AIR CLEANER—Check operation
CARBURETOR CHOKE—Check operation and lubrication
ENGINE IDLE SPEED ADJUSTMENT
EFE SYSTEM—Check operation
CARBURETOR—Torque attaching bolts or nuts to manifold
VACUUM ADVANCE SYSTEM AND HOSES—Check operation
CARBURETOR FUEL INLET FILTER—Replace
PCV SYSTEM—See Explanation of Maintenance Schedule
SPARK PLUG AND IGNITION COIL WIRES—Inspect and clean
IDLE STOP OR SPEED UP SOLENOID OR DASHPOT—Check operation
SPARK PLUGS—Replace
ENGINE TIMING ADJUSTMENT AND DISTRIBUTOR CHECK
CARBURETOR VACUUM BREAK INSPECTION AND ADJUSTMENT
ECS SYSTEM—See Explanation of Maintenance Schedule
FUEL CAP, TANK AND LINES—Check condition
AIR CLEANER ELEMENT—Replace
DRIVE BELTS—Check condition and adjustment
IGNITION DWELL
EXHAUST GAS RECIRCULATION SYSTEM
IDLE MIXTURE
VALVE LASH ADJUSTMENT
CATALYST

MAINTENANCE FREQUENCY

5,000 Miles 15,000 Miles 22,500 Miles 30,000 Miles 37,500 Miles 45,000 Miles



Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1262

GENERAL MOTORS CORPORATION, et al., *Petitioners,*

v.

DOUGLAS M. COSTLE, Administrator of the Environmental Protection Agency, ENVIRONMENTAL PROTECTION AGENCY, AND STATE OF CALIFORNIA, *Respondents.*

Appendix To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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Automobile Importers of America, Inc.
Automotive Service Industry Association, *et al.*

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TABLE OF CONTENTS

PAGE

Opinion of the United States Court of Appeals for the District of Columbia Circuit, *The Motor and Equipment Manufacturers Association, Inc. v. Costle* and Consolidated Cases, No. 78-1896 *et al.*, Aug. 3, 1979 1

Order of Aug. 7, 1979 Making Formal Amendments in Opinion (D.C. Cir.) 67a

Order of Sept. 17, 1979 Denying Petition for Rehearing (D.C. Cir.) 70a

Order of Sept. 17, 1979 Denying Suggestion for Rehearing *en banc* (D.C. Cir.) 71a

Order by Mr. Chief Justice Burger Extending Until Feb. 14, 1980 the Time Within Which to File a Petition for Writ of Certiorari 72a

Decision of the Administrator of the Environmental Protection Agency Granting Waiver of Federal Preemption for California's Original In-Use Maintenance Regulations, 43 Fed. Reg. 32182 (July 25, 1978) 73a

Letter of Mar. 8, 1979 From Marvin B. Durning (EPA) to Thomas C. Austin (ARB) Addressing California's Regulations as Amended 86a

Relevant Constitutional Provisions, Statutes, and Regulations

First Amendment to United States Constitution 88a

Fourteenth Amendment to United States Constitution 88a

Section 207 of the Clean Air Act, 42 U.S.C. § 7541 .. 88a

Section 209 of the Clean Air Act, 42 U.S.C. § 7543 .. 94a

California Exhaust Emission Standards and Test Procedures for 1980 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles (In-Use Maintenance Regulations as Originally Adopted) 96a

Amendments to California Exhaust Emission Standards and Test Procedures for 1980 Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles (In-Use Maintenance Regulations as Amended). 100a

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1896

THE MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS COSTLE, Administrator, Environmental Protection Agency, RESPONDENTS

AUTOMOBILE IMPORTERS OF AMERICA and STATE OF CALIFORNIA, INTERVENORS

No. 78-1901

AUTOMOTIVE SERVICE INDUSTRY, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

STATE OF CALIFORNIA and AUTOMOBILE IMPORTERS OF AMERICA, INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 78-1931

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., PETITIONER

v.

DOUGLAS M. COSTLE, Administrator of the Environmental Protection Agency
Environmental Protection Agency, RESPONDENTS

STATE OF CALIFORNIA and
AUTOMOBILE IMPORTERS OF AMERICA, INTERVENORS

No. 78-1943

CHRYSLER CORPORATON, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

STATE OF CALIFORNIA and
AUTOMOBILE IMPORTERS OF AMERICA, INTERVENORS

No. 78-1944

GENERAL MOTORS CORPORATION, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency, RESPONDENTS

STATE OF CALIFORNIA and
AUTOMOBILE IMPORTERS OF AMERICA, INTERVENORS

Petitions for Review of Orders of the Environmental Protection Agency

---

Argued March 26, 1979

Decided August 3, 1979

John H. Pickering, with whom *Timothy N. Black* and *Charles H. Lockwood* were on the brief, for petitioner in No. 78-1931.

William T. Coleman, Jr. with whom *Richard C. Warmer, Donald T. Bliss, Jr.* and *William L. Weber, Jr.* were on the brief, for petitioner in No. 78-1944.

Mark R. Joelson, with whom *Marc L. Fleischaker* and *Lawrence P. Postol* were on the brief, for petitioner in No. 78-1896.

James F. Flanagan, with whom *Harold T. Halfpenny* was on the brief, for petitioner in No. 78-1901.

Victor C. Tomlinson was on the brief, for petitioner in No. 78-1943.

James McNab, III, Attorney, Environmental Protection Agency, a member of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, *Bruce I. Bertelsen*, Attorney, Environmental Protection Agency, a member of the bar of the Supreme Court of Michigan, *pro hac vice*, by special leave of court, and *David Dearing*, Attorney, Department of Justice, with whom *Sanford Sagalkin*, Acting Assistant Attorney General, *Joan Z Bernstein*, General Counsel, and *Gerald K. Gleason*, Attorney, Department of Justice, were on the brief, for respondent. *James Moorman* and *Lloyd Guerci*, Attorneys, Department of Justice, also entered appearances for respondents.

Joel S. Moskowitz, Deputy Attorney General of the State of California, for intervenor State of California.

Milton D. Andrews, Dennis M. Schwentker, and *Lance E. Tunnick* were on the brief for intervenor Automobile Importers of America, Inc.

Before WRIGHT, *Chief Judge,* and MACKINNON and ROBB, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: Section 209 of the Clean Air Act, 42 U.S.C. § 7543 (Supp. I 1977), requires the Administrator of the Environmental Protection Agency (EPA) to waive federal preemption of motor vehicle emission control regulations for the State of California unless he makes certain findings that a waiver is inappropriate.[1] In July 1978 the Administrator waived fed-

[1] Section 209 as amended in 1977 provides:

(a) Prohibition

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

[Continued]

eral preemption for California regulations limiting the amount of maintenance that a manufacturer can require of motor vehicle purchasers in the written instructions which accompany new motor vehicles sold in that State.

[1] [Continued]

(A) the determination of the State is arbitrary and capricious.

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

(c) Certification of vehicle parts or engine parts

Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 7541(a)(2) of this title, no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part. The preceding sentence shall not apply in the case of a State with respect to which a waiver is in effect under subsection (b) of this section.

(d) Control, regulation, or restrictions on registered or licensed motor vehicles

[Continued]

The issue in these cases [2] is whether the Administrator's decision to do so was arbitrary, capricious, or otherwise not in accordance with law. We answer that question in

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[1] [Continued]

Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

42 U.S.C. § 7543 (Supp. I 1977). California is the only state which had adopted emission control standards (other than crankcase emission standards) before March 30, 1966. It is thus the only state eligible for a waiver.

[2] This opinion disposes of the petitions filed in Docket Nos. 78-1896, 78-1901, 78-1931, 78-1943, and 78-1944, each of which challenges the Administrator's July 1978 decision to waive federal preemption for California's in-use maintenance regulations. Petitioners in Docket Nos. 78-1896, 78-1931, 78-1943, and 78-1944 include The Motor & Equipment Manufacturers Association, the Automotive Service Industry Association, the Motor Vehicle Manufacturers Association of the United States, the Chrysler Corporation, and the General Motors Corporation. These petitioners jointly raise all the issues discussed herein except for those relating to the Administrator's obligation to consider the antitrust implications of the waiver. The antitrust implications of the waiver is the concern of the petition filed in Docket No. 78-1901. Petitioners in that case are The Automotive Service Industry Association and the Motor & Equipment Manufacturers Association, Inc. For ease of reference, we refer to the proponents of the waiver denial as "petitioners" throughout this opinion, but we wish to make clear that not all the parties join in the argument about the antitrust implications of the Administrator's decision to waive preemption.

Argued with the foregoing petitions was the petition filed in Docket No. 78-1794. Although this petition challenges a different waiver decision, it raises essentially the same issues discussed herein. We dispose of it as a companion to this opinon. Motor & Equipment Manufacturers Assn. v. EPA —— F.2d —— (D.C. Cir. Docket No. 78-1794 decided August 3, 1979).

the negative, and we accordingly deny the petition to set aside the Administrator's order.[3]

I

BACKGROUND

The federal program for the control of motor vehicle emissions is the product of the Clean Air Act as amended, 42 U.S.C. §§ 7401 *et seq.* (Supp. I 1977).[4] Section 202 of this statute establishes nationwide motor vehicle emission standards applicable to certain model years for three major pollutants, carbon monoxide, hydrocarbons, and oxides of nitrogen. *Id.* § 7521(b). It also sets long-term goals for the control of emissions, and authorizes the EPA Administrator to prescribe standards consistent with those goals for model years not covered by the statute. *Id.* § 7521(a). These regulations can take effect at such time as the Administrator finds them to be technologically feasible, giving appropriate consideration to the costs of compliance. *Id.*

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[3] Our jurisdiction derives from 42 U.S.C. § 7607(b)(1) (Supp. I 1977).

[4] The Clean Air Act includes the basic legislation enacted as The Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392, as well as amendments made by The Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965); The Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954; The Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485; The Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; The Comprehensive Health Manpower Training Act, Pub. L. No. 92-157, 85 Stat. 431 (1971); The Energy Supply & Environmental Coordination Act, Pub. L. No. 93-319, 86 Stat. 248 (1974); The Safe Drinking Water Act of 1977, Pub. L. No. 95-190, 91 Stat. 1399; and The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685.

Section 206 requires the Administrator to test or to have tested any new motor vehicle or new motor vehicle engine submitted by a manufacturer to determine whether the vehicle or engine conforms to the standards contained in section 202 and in the regulations promulgated under it. *Id.* § 7525(a).[5] This "certification process" consists of various procedures which enable a manufacturer to demonstrate by use of a prototype that it has designed a class of motor vehicle which complies with the standards. One feature of this certification process is a durability test to determine the effects of deterioration on the functioning of the emission control system.[6] The Administrator limits by regulation the amount of "scheduled maintenance" that can be performed on the prototype vehicle during this durability test.[7]

If the Administrator finds that the new motor vehicle will meet the applicable emissions standards he issues a certificate of conformity to cover the class of motor vehicles represented by the prototype. *Id.* at 7525(a). This certificate is a condition precedent to the initial retail sale of new motor vehicles.[8]

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[5] Whenever the statute refers to "new motor vehicle" the phrase is followed by "or new motor vehicle engine." We hereafter refer to "new motor vehicle" as including "new motor vehicle engine."

[6] The regulations governing the federal certification program are found in 40 C.F.R. § 86.078 (1978).

[7] *See id.* § 86.078-25. The durability test is designed to ensure that a vehicle's emission control system will retain its control capacity, a purpose obviously frustrated if the manufacturer is permitted to repair the system at will. As will inevitably happen on occasion, if a part fails before maintenance is scheduled, "unscheduled maintenance" must be undertaken.

[8] Section 203 prohibits a manufacturer from introducing into commerce a new motor vehicle not covered by a certificate of conformity. 42 U.S.C. § 7522(a)(1) (Supp. I 1977). Section 205 provides for the imposition of a civil penalty of up to $10,000 for violations of this prohibition. *Id.* § 7524. In addition to prescribing the certification process, section 206 authorizes the Administrator to develop "test procedures" to determine whether motor vehicles under production actually conform to the standards pursuant to which the certificate of conformity was issued. If these tests reveal that the manufactured vehicles do not so conform, the Administrator is empowered to suspend, revoke, or modify the certificate. *Id.* 7525(b).

Section 207 imposes two types of warranty obligations on manufacturers which are directly related to the standards issued in section 202. First it requires manufacturers to warrant to purchasers that each new motor vehicle is designed, built, and equipped to conform to the section 202 standards, and further to warrant that each is free of defects in materials and workmanship which cause a motor vehicle to fail to conform to the standards for their useful life. *Id.* § 7541(a).[9] This is the defect warranty. Second, it provides that the Administrator shall impose a "performance warranty" on manufacturers whereby manufacturers will bear the costs of remedying any nonconformity with section 202 emission standards on vehicles maintained in accordance with the written maintenance instructions required by the statute. *Id.* § 7541(b).[10] The written maintenance instructions, which

[9] Section 207 refers to section 202 for its definition of "useful life." 42 U.S.C. § 7541(a) (Supp. I 1977). Section 202 defines the useful life of light duty vehicles (and engines) and of "other motor vehicles" (and engines) as five years or fifty thousand miles, whichever first occurs. *Id.* § 7521(d). The Administrator can make an upward adjustment in the useful life of "other motor vehicles" if he determines that a period of greater duration or mileage is appropriate. *Id.*

[10] Before imposing a performance warranty the Administrator must first determine that there are methods and procedures which accord with good engineering practices and which are capable of correlation to the certification process that can ascertain whether new motor vehicles in actual use comply with the section 202 standards for their useful life.

manufacturers must furnish with each new motor vehicle, must conform to regulations promulgated by the Administrator. *Id.* § 7541(c)(3). If the purchaser fails to comply with the written instructions it relieves the manufacturer of his performance warranty obligations.[11]

By virtue of the unique status it enjoys under section 209 of the Clean Air Act, California has an emissions control program that parallels the federal program in many respects. This litigation grew out of a decision made by the California Air Resources Board (CARB), which is California's version of the federal EPA in the area of emissions control regulations. In May 1977, the CARB adopted regulations limiting the amount of scheduled maintenance that can be performed on the prototype used in the durability testing during California's certification process.[12] No party in this court challenges

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42 U.S.C. § 7541(b) (Supp. I 1977). The performance warranty like its counterpart runs to the ultimate and any subsequent purchaser. *Id.* Whereas section 202's definition of useful life governs the duration of the defect warranty, however, the performance warranty applies to the entire "emission control device or system" only for twenty-four months or twenty-four thousand miles, whichever first occurs. *Id.* The performance warranty thereafter applies only to "a catalytic conveter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions." *Id.*

[11] At the time this controversy arose, the Administrator had not yet made the requisite findings and thus had not promulgated regulations governing maintenance instructions. *See* 43 Fed. Reg. 32182, 32184 (1978).

[12] The regulations restrict the scheduled maintenance to the inspection, replacement, cleaning, adjustment, or service, at specified intervals, as follows: drive belt tension (at 30,000 miles), exhaust gas sensor (30,000), spark plugs (30,000), choke lubrication (30,000), and valve lash (15,000). If the manufacturer can show that such maintenance is actually done in use, it may additionally schedule maintenance for the

the application of these maintenance restrictions to the certification process. Rather the object of challenge is the CARB's simultaneous decision to limit the maintenance a manufacturer can require of purchasers in the written instructions manufacturers must furnish with each new motor vehicle. Under these "in-use maintenance regulations," a manufacturer cannot require a purchaser to perform maintenance beyond that which a manufacturer can perform during the certification process.[13] The furnishing of written instructions which abide by the in-use maintenance regulations is a condition precedent to the initial retail sale of new motor vehicles in California. The regulations also define the manufacturers' warranty obligations.

Foreshadowing the CARB's decision to adopt the regulations was a series of public hearings and workshops the CARB held to discuss proposed regulations limiting certification and in-use maintenance. At the first of these meetings, held in November 1976, the major topic was a

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engine idle speed, the valve lash, and the engine bolt torque at 5,000 miles. California Exhaust Emission Standards & Test Procedures ¶ 3f (1978), *reprinted in* Joint Appendix Statutory Supplement (J.A.S.S.) at 263-65. These regulations apply to 1980 and subsequent model year gasoline-powered passenger cars and to 1981 and subsequent model year gasoline-powered light duty trucks and medium duty vehicles. *Id.* The regulations are incorporated by reference in 13 Cal. Admin. Code § 1960(c).

[13] *See* note 12 *supra*. The one difference is that for in-use maintenance the CARB's Executive Officer can approve additional in-use maintenance requirements which he finds necessary to account for extreme driving conditions or to ensure safe operation. California Exhaust Emission Standards & Test Procedures ¶ 3g (1978), *reprinted in* J.A.S.S. at 267-68; *see* Amendments to California Exhaust Emission Standards & Test Procedures, ¶ 1 (1979), *reprinted in* Joint Appendix (J.A.) at A110; note 18 *infra*.

CARB staff report which stated that "[d]ata available from emissions testing of in-use vehicles show that the degree of emission control which was demonstrated during the certification program is not being realized." [14] The staff contended that one of the reasons the emissions systems on in-use vehicles were not controlling emissions as they had during certification was improper maintenance on emission-related parts. The staff suggested that by lowering the amount of maintenance that needed to be done on in-use vehicles, the CARB could reduce the risks of improper maintenance and encourage the production of more durable emission-related parts.

This staff report contained recommendations on the amount of maintenance that ought to be allowed, but owing to objections by manufacturers the CARB deferred any decision on the proposals. Over the next six months, the CARB staff studied the problem further, concentrating particularly on the questions raised by manufacturers about the technological feasibility of limiting maintenance on various parts.[15] The final recommendations

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[14] California Air Resources Board, Staff Report No. 76-22-2 (b), 1 (November 23, 1976), *reprinted in* J.A. at 102.

[15] In December 1976, the CARB conducted workshops for members of its staff and representatives of the motor vehicle manufacturers and parts and services industry. Although the staff concluded after these workshops that the statements of manufacturers "support most of the reduction in allowable maintenance . . . proposed by the staff," it concluded that additional study on technological feasibility and related problems was necessary before any final decision on the proposals. California Air Resources Board, Supplement to Staff Report No. 76-22-2(b), 10-11 (December 14, 1976), *reprinted in* J.A. at 124. Many of the manufacturers' objections related to the CARB staff's use of a study on technological feasibility based only on mileage (as opposed to mileage and time) intervals. *See* text accompanying notes 62-63 *infra*. Acting on the staff recommendation, the CARB postponed consideration of the in-use maintenance regulations. California Air Resources

the staff made to the CARB significantly altered the staff's earlier recommendations on the amount of maintenance a manufacturer could require of motor vehicle purchasers.[16] The CARB solicited comments from manufacturers and other interested parties on these proposals.

After formally adopting the regulations the CARB wrote to the EPA requesting a waiver pursuant to section 209. In accordance with the statute the Administrator conducted a public hearing at which all interested parties were invited to offer testimony for and against the waiver request. After this hearing was held, Congress amended the Clean Air Act, altering among other things the waiver provision.[17] The Administrator announced that he would conduct another hearing to explore the implications of these amendments for the CARB's regulations. In the interim, the CARB adopted a resolution in which it found that the maintenance reg-

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Board, Minutes of Meeting 76-23, 1 (December 14, 1976), *reprinted in* J.A. at 112.

In January 1977, the CARB staff sent out questionnaires soliciting information on technological feasibility. In April, the staff issued another report in which it significantly altered the proposed maintenance restrictions. *See* note 16 *infra*. Public hearings were held on the proposals in April and in May.

[16] *See* California Air Resources Board, Staff Report No. 77-12-1, 17 (May 26, 1977), *reprinted in* J.A. at 178. These recommendations did not significantly differ from those advanced in April. *See* California Air Resources Board, Staff Report No. 77-9-2, 17 (April 28, 1977), *reprinted in* J.A. at 142. The original staff recommendations would have limited maintenance to the adjustment of the valve lash at 15,000 miles and the air filter at 30,000 miles. *See* California Air Resources Board, Staff Report No. 76-22-2(b), 8 (November 23, 1976), *reprinted in* J.A. at 109.

[17] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 207, 91 Stat. 755. The 1977 amendments applied to pending waiver requests. *See* 42 Fed. Reg. 45942 (1977), *reprinted in* J.A. at 52-54.

ulations "individually and collectively" met the requirements imposed by the amendments.[18] The CARB introduced this resolution and the accompanying staff report at the second EPA hearing on the waiver request.

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[18] California Air Resources Board, Resolution No. 77-48, 4 (September 29, 1977), *reprinted in* J.A. at 279. This resolution was based on a staff report which concluded that the in-use maintenance regulations, when coupled with other revisions in the State's emissions control program, would result in identifiable emissions benefits. California Air Resources Board, Staff Report No. 77-20-2, 24 (September 12, 1977), *reprinted in* J.A. at 229. *See* note 59 *infra*.

A large portion of the manufacturers' complaints about the in-use maintenance regulations rested on the CARB's original decision to restrict what a manufacturer could recommend to —as opposed to require of—motor vehicle purchasers. The manufacturers reasoned that they ought to be able to suggest any maintenance they believed reasonable and necessary. In response to these criticisms, the CARB in February 1979 decided to adopt emergency amendments to its in-use maintenance regulations to clarify what a manufacturer could and could not include in the written instructions. *See* California Air Resources Board, Notice of Public Hearing, 1 (February 22, 1979), *reprinted in* J.A. at A104. These regulations permit the manufacturers to recommend additional maintenance as long as they make clear that this recommended maintenance is not required. Amendments to California Exhaust Emission Standards & Test Procedures ¶ 1 (1979), *reprinted in* J.A. at A110; *see* California Air Resources Board, Staff Report [Unnumbered], 2-3 (March 2, 1979), *reprinted in* J.A. at A117-18. The regulations were formally confirmed by the CARB after oral argument in these cases. *See* Joint Supp. Memo of Petitioners at 5-6.

As the dates indicate, the emergency amendments post-dated the Administrator's waiver decision and thus obviously played no part in it. Some of the petitioners therefore argue that the regulations are not properly before this court.

It is basic that agency action cannot be sustained on the basis of information not relied upon by the agency or disclosed in its record of consideration. Gulf State Utilities Co. v. FPC, 411 U.S. 747, 764 (1973). Although this court has sanctioned

Nine months after the second hearing the Administrator announced his decision to waive federal preemption of the in-use maintenance regulations. He offered two basic reasons for his decision. First, he said, there was no plausible evidence in the record to indicate that California's new in-use maintenance regulations would impair the ability of California's emission standards—for which a waiver had already been granted—to protect the public health and welfare at least as ably as the corresponding federal standards. Second, he said, the manufacturers had failed to show that adherence to the regulations would be technologically infeasible, the costs of compliance considered. The Administrator concluded that lacking such evidence he had no alternative but to grant the waiver request.

These petitions ensued.

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supplementation of the record in certain circumstances, *see* Amoco Oil Co. v. EPA, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974), the practice decidedly is the exception not the rule. The problem here, however, is very different from the situation in which the agency seeks to support an unchanged agency rule or order of continuing effect with new evidence never tested in the administrative process. Rather here there is a fundamental change in the state of affairs: the regulations to which petitioners primarily object no longer exist. A cornerstone of our jurisprudence is that an Article III court does not sit to issue advisory opinions on abstract questions. Were we to ignore the public record of the CARB's amendments we would in effect be deciding a hypothetical question. Consequently, taking judicial notice of the CARB amendments, we hold that insofar as petitioners' claims pivot on the earlier restrictions on what manufacturers could recommend to (as opposed to require of) vehicle owners, these claims are moot. *Cf.* EPA v. Brown, 431 U.S. 99, 103 (1977) (per curiam) (subsequent change in effect of regulations renders controversy moot).

II

Standard of Review

At the outset we note the modest scope of our inquiry. Three points bear emphasis. First, our review here is of the Administrator's decision to waive federal preemption for the State of California, not of California's decision to adopt the in-use maintenance regulations. Our concern is whether a federal officer properly discharged his responsibilities under a federal statute. If petitioners dislike the substance of the CARB's regulations, or if they believe the procedures the CARB used to enact them were unsatisfactory, then they are free to challenge the regulations in the state courts of California.

Second, section 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), governs our examination of whether the Administrator properly discharged his responsibilities under section 209. *Ascaro v. Environmental Protection Agency*, 578 F.2d 319, 325 (D.C. Cir. 1978); *National Association of Demolition Contractors, Inc. v. Costle*, 565 F.2d 748, 750 n.1 (D.C. Cir. 1977). This means we must uphold the Administrator's action unless we find that it is "'arbitrary and capricious, . . . or otherwise not in accordance with law' or if [it] fails to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (quoting 5 U.S.C. § 706). We cannot substitute our judgment for that of the Administrator. *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir.) (en banc), *cert. denied*, 426 U.S. 941 (1976). We must instead presume that the Administrator acted lawfully and so conclude unless our thorough inspection of the record yields no discernible rational basis for his action. *See Barrier Industries Inc. v. Eckard*, 584 F.2d 1074, 1079 (D.C. Cir. 1978); *Appalachian Power Co. v. Environmental Protection Agency*, 579 F.2d 846, 851 (4th Cir. 1978). The Administrator must give reasoned consideration to the issues before him and reach a result which rationally flows from this consideration. If he does so, and presents that rational basis in his decision, then his decision is not arbitrary and capricious. *National Association of Food Chains, Inc. v. ICC*, 535 F.2d 1308, 1314 (D.C. Cir. 1978) (per curiam); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

Third, aware of the technical expertise and need for flexibility of administrative agencies, courts typically defer to a nearly contemporaneous construction of a statute by an agency charged with administering it. *See International Brotherhood of Teamsters v. Daniel*, 99 S.Ct. 790, 800 n.20 (1979); *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719 (1975). Applying this principle the Supreme Court has held that the EPA's interpretation of the Clean Air Act is entitled to considerable respect. *Union Electric Co. v. Environmental Protection Agency*, 427 U.S. 246, 256 (1978); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975). "The construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1967); *accord, Beal v. Doe*, 432 U.S. 438 (1977); *United States v. Burlington & Missouri River Railroad Co.*, 98 U.S. (8 Otto) 334, 341 (1879). For us to conclude that the Administrator misconstrued section 209 petitioners must show by clear and convincing evidence that his construction is unreasonable.

Thus mindful of our restricted role, we turn to consider petitioners' claims. Petitioners posit five basic questions for decision. First, does section 209(b) empower the Administrator to consider a waiver of federal pre-

emption for the CARB's in-use maintenance regulations? Second, if it does, what questions must the Administrator address before granting the waiver? Third, assuming the Administrator addressed the correct questions, how must he go about dealing with them? Fourth, if the Administrator properly addressed the correct questions, is there a discernible rational basis for the decision he reached? Finally, does the Administrator's decision to waive violate constitutional requirements? We examine these questions in turn.

III

THE SCOPE OF THE WAIVER POWER

The first question for decision is whether section 209 empowers the Administrator to consider a waiver of federal preemption for California's in-use maintenance regulations. Petitioners argue that the in-use maintenance regulations are not aimed at emissions control performance of new motor vehicles but instead purport to regulate in-use performance and post-sale obligations of manufacturers. As such, they contend, the regulations intrude on the pervasive federal regulatory scheme embodied in section 207, 42 U.S.C. § 7541 (Supp. I 1977), and are not subject to waiver under subsection (b) of section 209. Petitioners acknowledge that absent some provision for waiver the regulations are preempted by subsection (a) of section 209. They thereby avoid any explicit suggestion that section 207 alone effects a preemption of the CARB's in-use maintenance regulations and exclusively rely on a theory that subsection (b)'s waiver power is circumscribed by section 207.

The Administrator rejected this claim on the ground that the only relevant preemption provision is the express terms of subsection (a) and that whatever is preempted therein is subject to waiver under subsection (b). We agree.

Nothing in section 209 supports petitioners' one-way approach to waiver of federal preemption for California. Subsection (b) provides that unless the Administrator makes certain findings he must "waive application *of this section*" to California. 42 U.S.C. § 7543(b)(1) (Supp. I 1977) (emphasis added), *reprinted in* note 1 *supra*. The underscored phrase has no conceivable meaning other than to refer to subsection (a).[19] Subsection (a) forbids any state from "adopt[ing] or attempt[ing] to enforce" standards relating to emissions from new motor vehicles, and from imposing any requirements relating to same as a "condition precedent" to the initial retail sale of motor vehicles. *Id.* § 7543(a). California's in-use maintenance regulations are attempts to enforce California's emission standards, and compliance with the regulations is a condition precedent to the initial retail sale of motor vehicles in California. The in-use maintenance regulations are, therefore, preempted by subsection (a). Subsection (b) authorizes the Administrator to waive application of subsection (a) for California; it contains no suggestion that the scope of this authority

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[19] Section 209 contains a subsection (c) and subsection (d). *See* note 1 *supra*. Subsection (c) preempts states from certifying automotive parts, 42 U.S.C. § 7543(c) (Supp. I 1977), which is part of Congress' effort to lessen the anticompetitive consequences of the warranty obligations, *see* H.R. Rep. No. 294, 95th Cong., 1st Sess. 293-94 (1977). By its own terms subsection (c) does not apply to California. If anything, this tends to belie petitioners' claims that Congress did not intend California to regulate in the post-sale warranty area as an incident to its power to adopt and enforce its own emission standards. Subsection (d) makes clear that the preemption provision is not intended to preempt state regulation other than as expressed in subsection (a). 42 U.S.C. § 7543(d) (Supp. I 1977). This too has consequences for petitioners' argument. Petitioners suggest that the in-use maintenance regulations are not aimed at controlling emissions from new motor vehicles, but if this is so (and we hold it is not), then California need not even seek a waiver because subsection (d) preserves the field of regulation of *old* motor vehicles to state control *ad initio*.

is something other than that defined by subsection (a). Hence the Administrator is empowered to waive federal preemption for California's in-use maintenance regulations.

The plain meaning of the statute indicates that Congress intended to make the waiver power coextensive with the preemption provision. Petitioners' efforts to reduce the phrase "of this section" to a truism would, if successful, render the California waiver provision either meaningless or inffectual.

First, if only the pervasiveness of section 207's regulation of in-use performance is sufficient to restrict the Administrator's waiver authority, there is no reason why on the same reasoning a comparable limitation could not be found in section 202's pervasive regulation of national motor vehicle emission standards or section 206's pervasive regulation of the federal certification process. Sections 202, 206 and 207 are all integral parts of a comprehensive federal program; all three are equally treated in section 209(a). Yet were the Administrator to regard sections 202 and 206 as petitioners urge him to regard section 207, he would be powerless to consider waiving federal preemption for California's emission standards and certification process. This lack of power would render the waiver provision—and indeed the express preemption provision—mere surplusage.[20] It

[20] Petitioners' argument about section 207 circumscribing the waiver power avoids, as noted, any direct suggestion that section 207 alone achieves an implied preemption of the in-use maintenance regulations. The argument, however, can fairly be characterized as an implied preemption claim in masquerade, and indeed the Administrator and the State of California understandably interpreted it as such in their submissions to this court. *See* Br. for Respondents at 29-32; Br. for Intervenors at 25-34. The obstacles facing a straightforward implied preemption claim are formidable. First, there being an express preemption provision that clearly covers the challenged regulations, no need exists to turn to a theory of implication. *Cf.* City of Burbank v. Lockheed Air

is axiomatic that a statute must be construed to avoid that result so that no provision will be inperative or superfluous. *See United States v. Menasche*, 348 U.S. 528 (1955).

Second, if instead petitioners divine the limit on the waiver authority from section 207's particular area of regulation—in-use performance—then their argument is that Congress did not intend California to have any interest in emissions control once new motor vehicles leave the assembly line. Certainly section 209 makes no distinction among different types of in-use performance regulation which operate as enforcement procedures and conditions precedent.[21] Thus on petitioners' reading the statute permits California to establish emission standards and certification procedures, but forbids it from ensuring that the standards are effective once the motor vehicle leaves the showroom. Yet the only time that a new motor vehicle is capable of polluting the environment is when it

Terminal, Inc., 411 U.S. 624, 633 (1977) (examining implied preemption only after noting absence of express provision). Second, the burden of demonstrating preclusion of state regulation by implication from federal regulation is a heavy one, *see* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-47 (1963), and cannot be met by a mere showing of "the comprehensive character" of the federal scheme, *see* New York Dept. of Social Services v. Dublino, 413 U.S. 405, 415 (1973). Third, that burden is rendered ever more difficult here because section 116 of the Clean Air Act lists those provisions of the statute which Congress intended to reserve for exclusive federal regulation, and section 207 is not among them. 42 U.S.C. § 7416 (Supp. I 1977).

Section 116 is not germane to our inquiry because it does list section 209 among those provisions preempting state regulation. The cases on implied preemption are relevant only in bolstering our conclusion that subsection (b) contains no implied restrictions on the Administrator's power to consider waiver requests.

[21] *See* note 19 *supra*.

is out on the road. The purpose of the Clean Air Act is to reach precisely that kind of pollution. Our duty is to "favor an interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where, as here, that interpretation is consistent with the plain language of the statute." *National Petroleum Refiners Association v. FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

The legislative history of section 209 supports the Administrator's interpretation that the waiver provision is coextensive with the preemption provision, thereby permitting the Administrator to consider waiving preemption of California's entire program of emissions control.[22] No federal statute purported to regulate emissions from motor vehicles until 1965, when Congress enacted The Motor Vehicle Air Pollution Control Act, section 202 of which authorized the Secretary of Health, Education, and Welfare to prescribe emission standards.[23] Although signs appear in the legislative history that this enactment was intended to enhance uniformity in national efforts at

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[22] Petitioners complain that the Administrator cites no legislative history to support his use of the waiver power to permit the California in-use maintenance regulation. It is, however, the *petitioners* who bear the burden of demonstrating that the Administrator's interpretation of section 209 is unreasonable. It is true that the legislative history of the waiver provision contains no direct reference to the issue of waiving in-use maintenance regulations, but legislative history is not required to cover every aspect of a statute's application. As we show, there are overwhelming indications in the legislative history that Congress intended California to enjoy the broadest possible discretion in selecting a complete program of emissions control, and not the slightest indication that it intended section 207 to qualify that discretion.

[23] Pub. L. No. 89-272, § 202, 79 Stat. 992 (1965).

pollution control,[24] the statute contained no express preemption provision. Consequently states generally felt free to adopt regulations in the field, and several states followed up the federal statute with regulatory schemes of their own.[25]

The states acting after 1965 were Johnnies-come-lately to the field compared to California, which had undertaken statewide efforts as early as 1958.[26] Congress' entry into the field and the heightened state activity after 1965

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[24] *See, e.g.*, S. Rep. No. 192, 89th Cong., 1st Sess. 5-8 (1965); H.R. Rep. No. 899, 89th Cong., 1st Sess. 5 (1965); *Hearings on H.R. 463 Before the Subcomm. on Public Health & Welfare of the House Comm. on Interstate & Foreign Commerce*, 89th Cong., 1st Sess. 281 (1965) (statement of Mr. Barr).

[25] *See generally* Currie, *Motor Vehicle Air Pollution: State Authority and Federal Preemption*, 68 Mich. L. Rev. 661, 674 (1971). As Professor Currie notes, these efforts were partly encouraged by the Supreme Court's decision in Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), which rejected an implied preemption claim based on federal regulation of air pollution.

[26] California's interest in pollution control from motor vehicles dates to 1946. Stevens, *Air Pollution and the Federal System: Responses to Felt Necessities*, 22 Hastings L.J. 661, 674 (1971). Comprehensive statewide efforts began in 1957, when the State granted county air pollution control boards the authority to prescribe standards for emission control devices and to prohibit the sale of unapproved devices. 1957 Cal. Stats., chap. 239, § 1 (former Cal. Health & Safety Code § 24263.7). This was followed by the authorization for the establishment of statewide standards, 1959 Cal. Stats., chap. 200 (former Cal. Health & Safety Code § 426.5), and a certification procedure, 1960 Cal. Stats., chap. 23, § 1 (former Cal. Health & Safety Code § 24386). The Senate Report on the Motor Vehicle Air Pollution Control Act observed that California "leads in the establishment of standards for regulation of automotive pollutant emissions." S. Rep. No. 192, 89th Cong., 1st Sess. 5 (1965).

raised the spectre of an anarchic patchwork of federal and state regulatory programs, a prospect which threatened to create nightmares for the manufacturers.[27] Acting on this concern, Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states—all, that is, except California.

As originally introduced in the Senate the Air Quality Act of 1967 did not contain an express preemption provision,[28] though the topic of preemption quickly arose and immediately became the object of intense debate.[29] The debate sharpened the differences between the states, which wanted to preserve their traditional role in regulating motor vehicles, and the manufacturers, which wanted to avoid the economic disruption latent in having to meet fifty-one separate sets of emissions control requirements. The bill that emerged from the Senate Committee contained a compromise: Subsection (a) preempted state programs of emissions control for new motor vehicles; subsection (b) provided an exception for California if that State determined that its standards would be "more stringent" than applicable federal standards.[30] The Senate Committee explained:

> On the question of preemption, representatives of the State of California were clearly opposed to displacing the State's right to set more stringent standards to meet peculiar local conditions. The auto industry conversely was adamant that the nature of their manufacturing mechanism required a single national standard in order to eliminate undue economic strain on the industry.
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> The committee has taken cognizance of both of these points of view. Senator Murphy convinced the committee that California's unique problems and pioneering efforts justified *a waiver of the preemption section* to the State of California.

S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (emphasis added).

Thus the Committee that formulated the waiver provision understood the costs involved in making an exception for California and decided to recommend that these costs be absorbed by allowing a waiver not of *part* of the preemption provision, but of the entire subsection (a). According to the Committee, the advantages of the California exception included the benefits for the Nation to be derived from permitting California to continue its experiments in the field of emissions control—benefits the Committee recognized might "require new control systems and design," *id.*—and the benefits for the people of California to be derived from letting that State improve on "its already excellent *program*" of emissions control, *id.* (emphasis added). There is no intimation in the Senate Committee report that the waiver provision was designed to permit California to adopt only a portion of such a program. The House accepted the Senate version.[31]

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[27] This prospect never materialized. The federal government did not make its first standards applicable until the 1968 model year. 45 C.F.R. § 85.1-.87 (1967). By that time, Congress had already enacted the express preemption provision.

[28] *See Hearings on Automotive Air Pollution Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st Sess. 8 (1967).

[29] *Id.* at 13-14 (statement of W. Donn); *id.* at 107 (statement of D. Coston); *id.* at 403 (statement of T. Mann).

[30] S. Rep. No. 403, 90th Cong., 1st Sess. 81 (1967).

[31] Not without a fight. *See* text accompanying note 51 *infra*. The battle over the waiver provision in the House did not turn on the scope of the waiver power, however, and the debate on the floor of the House indicates that the members shared the Senate's conviction that the waiver provision was intended to permit California to adopt an entire program of emissions control. *See, e.g.*, 113 Cong. Rec. 30950 (1967)

Congress had an opportunity to restrict the waiver provision in making the 1977 amendments, and it instead elected to expand California's flexibility to adopt a complete program of motor vehicle emissions control. Under the 1977 amendments, California need only determine that its standards will be "in the aggregate, at least as protective of public health and welfare than applicable Federal standards," rather than the "more stringent" standard contained in the 1967 Act.[32] This change originated in the House. The House Committee Report explained:

(remarks of Rep. Springer); *id.* at 30948 (remarks of Rep. Staggers).

When the Senate considered the conference version of the Air Quality Act of 1967, only one comment was directed at the waiver provision, and this by its original sponsor:

> It was concern for allowing California to continue its pioneering efforts in the field of air pollution that led to the amendment [on waiver]. . . .
>
> . . . I am firmly convinced that the United States as a whole will benefit by allowing California to continue setting its own more advanced standards for control of motor vehicle emissions. In a sense, our State will act as a testing agent for various types of controls and the country as a whole will be the beneficiary of this research. . . . Our State intends to continue its efforts to eliminate air pollution without letup and asks only that no roadblocks be put in its path.

Id. at 32478 (remarks of Sen. Murphy).

[32] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 207, 91 Stat. 755. The intent of the 1977 amendment was to accommodate California's particular concern with oxides of nitrogen, which the State regards as a more serious threat to public health and welfare than carbon monoxide. California was eager to establish oxides of nitrogen standards considerably higher than applicable federal standards, but technological developments posed the possibility that emission control devices could not be constructed to meet both the high California oxides of nitrogen standard and the high federal

> The Committee amendment is intended *to ratify and strengthen* the California waiver provision and to affirm the underlying intent of that provision, i.e., *to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare.*

H.R. Rep. No. 294, 95th Cong., 1st Sess. 301-02 (1977) (emphasis added). This language appears in the same House Report that elaborately describes section 207's regulatory format. The Report is barren of an indication that Congress intended to confine California's discretion to the adoption of emission standards, certification processes, and test procedures.[33]

Since the inception of the federal government's emissions control program it has drawn heavily on the California experience to fashion and to improve the national efforts at emissions control.[34] The history of congressional consideration of the California waiver provision, from its original enactment up through 1977, indicates that Con-

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carbon monoxide standard. Under the 1967 waiver provision, each California standard had to be "more stringent" than the corresponding federal standard. Hence Congress amended the waiver provision to require only that the California standards in the aggregate were at least as protective of public health and welfare as applicable federal standards. This permits the State to maintain a high standard for oxides of nitrogen but a standard for carbon monoxide somewhat lower than the federal standard.

[33] *See* note 19 *supra*.

[34] The first federal emission standards were largely borrowed from California, for example. *See* S. Rep. No. 403, 90th Cong., 1st Sess. 32 (1967); Willens, *The Regulation of Motor Vehicle Emissions*, 3 Nat. Res. Lawyer 120, 123-24 (1970). The 1977 standards also drew heavily on the California experience in the ten years since enactment of the first waiver provision. *See* 123 Cong. Rec. H4852 (daily ed. May 21, 1977); *id.* at H5061 (daily ed. May 25, 1977).

gress intended the State to continue and expand its pioneering efforts at adopting and enforcing motor vehicle emission standards different from and in large measure more advanced than the corresponding federal program; in short, to act as a kind of laboratory for innovation. Had Congress wanted to limit California's role to forbid its adoption of any program comparable to the federal scheme in section 207, it could have easily done so. It did not. For a court to do so despite the absence of such an indication would only frustrate the congressional intent.

We therefore are unable to find compelling indications in the text of the statute, in its legislative history, or in its underlying intent that the Administrator's interpretation of the waiver provision is wrong. We accordingly hold that section 209(b) empowers the Administrator to consider a waiver request for in-use maintenance regulations.

IV

Waiver Considerations

The second question for decision requires us to determine the substantive matters the Administrator must address in considering a request for a waiver of in-use maintenance regulations. It is the petitioners' view that the Administrator neglected to address certain statutorily-prescribed matters, and, in addition, that he improperly declined to examine the constitutional and antitrust implications of the in-use maintenance regulations. The Administrator contends that he addressed all questions the statute requires him to address, and that the constitutional and anti-trust implications of the CARB regulations are beyond the scope of his review in a waiver proceeding. We essentially agree with the Administrator's position.

A. Section 209(b) Considerations

As noted, subsection (b) requires the Administrator to waive application of subsection (a) if California determines that its standards are at least as protective of the public health and welfare as applicable federal standards. A grant of the waiver is not necessarily automatic, however. Subsection (b) says that the Administrator shall not grant the waiver request if he finds (1) that California's determination of protectiveness was arbitrary and capricious; (2) that California does not need the standards to meet compelling and extraordinary circumstances; and (3) that the standards and accompanying enforcement procedures are inconsistent with section 202 (a) of the Clean Air Act, which as indicated requires the Administrator's standards to be technologically feasible.

The parties agree that if the Administrator makes any one of these findings with respect to a waiver request involving California "standards" he must deny the request. In his waiver decision, however, the Administrator characterized the in-use maintenance regulations as "accompanying enforcement procedures" rather than as "standards." According to him, the word "standards" connotes a numerical value setting the quantitative level of permitted emissions of pollutants by a new motor vehicle. Thus for example a regulation limiting motor vehicle emissions of carbon monoxide to 3.4 grams per mile is in his view a "standard."

The Administrator says that "accompanying enforcement procedures," on the other hand, are criteria designed to determine compliance with applicable standards, and that the in-use maintenance regulations, being relevant to the manufacturers' ability to produce motor vehicles which will comply with the standards for their useful life, are properly classified as enforcement measures. The Administrator notes that section 209(b) refers to accompanying enforcement procedures only in the context of consistency with section 202(a). On this

basis he concludes that in a waiver proceeding involving enforcement procedures tied to standards for which a waiver has already been granted the only questions he must address are (1) whether the enforcement procedures are so lax that they threaten the validity of California's determination that its *standards* are as protective of public health and welfare as applicable federal standards and (2) whether the enforcement procedures are consistent with section 202(a).

Petitioners insist that the in-use maintenance regulations are "standards." They say that a "standard" refers to any criteria with which the manufacturers must comply. Alternatively, they contend that however the in-use maintenance regulations are labeled, the Administrator must address each of the three statutory questions in every waiver proceeding. Thus they believe that the Administrator must deny the waiver if he finds that California acted unreasonably in concluding that the in-use maintenance regulations were as protective of the public health and welfare as federal regulations, or that the in-use maintenance regulations are not needed to meet compelling and extraordinary local conditions.

We need not resolve here the meaning of the word "standards" as it is used in every section of the Clean Air Act; our inquiry is confined to its use in section 209.[35] In that setting we believe that the Administrator

[35] For this reason we find unpersuasive petitioners' suggestion that section 302(k) of the Clean Air Act, 42 U.S.C. § 7602(k) (Supp. I 1977), which contains a definition of "emission standards," controls our examination of the meaning of the word "standards" in section 209. Section 302(k)'s definition was not enacted until ten years after the original waiver provision, and it was developed in the context of regulating emissions from stationary sources. The Conference Report on the 1977 amendments, which explained many of the differences between the Senate and House versions of the 1977 bill, strongly intimates that the definition applies only in the stationary source context. *See* H.R. Rep. No. 564, 95th Cong., 1st Sess. 172 (1977) (Conference Report). Moreover, as we explain, classifying the in-use maintenance regulations as "standards" would make it virtually impossible for California to enact such regulations, and this in turn would frustrate Congress' intent to provide California with the broadest possible discretion in selecting the best means for protecting the public health and welfare.

correctly classified the in-use maintenance regulations as "accompanying enforcement procedures" rather than as "standards."

Petitioners' definition would eliminate the concept of enforcement regulations as something distinct from a standard. Congress, however, clearly intended to make such a distinction in section 209. As noted, subsection (b) refers to "standards" *and* to "accompanying enforcement procedures." Subsection (a) provides that no state shall "adopt *or attempt to enforce* standards." These references to efforts at enforcement would have been unnecessary if Congress intended that "standards" meant any regulation relating to motor vehicle emissions control.

The legislative history also indicates that Congress intended the word "standards" in section 209 to mean quantitative levels of emissions rather than regulations involving certification or in-use maintenance restrictions. The Senate Report on the Air Quality Act of 1967, discussing the preemption provision, mentions "standards" for hydrocarbons, nitrogen oxides, and carbon monoxide in obvious reference to the numerical limitations on those pollutants. S. Rep. No. 403, 90th Cong., 1st Sess. 32 (1967). In describing the changes made in the waiver provision in 1977, the House Report explains why different quantitative "standards" might be necessary for California. H.R. Rep. No. 294, 95th Cong., 1st Sess. 302 (1977). This same report refers to the Administrator's power to review California's protectiveness determination, a determination which under the statute pertains to "standards," as limited to determining whether "the State acted unreasonably in evaluating the relative risks

of various pollutants in light of air quality, topography, photochemistry and climate in the State." *Id.* Numerical values on allowable emissions allocate the relative risks of pollutants; regulations on allowable maintenance do not.

The Administrator has consistently made a distinction between standards and accompanying enforcement procedures, confining the former to regulations on quantitative levels of emissions.[36] In construing the word "standards" in another section of the Clean Air Act, the Supreme Court defined the term as "a quantitative 'level' to be attained by the use of 'techniques,' 'controls,' and 'technology.'" *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290-91 (1978). In light of these considerations, we cannot conclude that the Administrator's definition is unreasonable.

We also agree with the Administrator that the distinction between standards and accompanyinging enforcement procedures is a meaningful one in a waiver proceeding, at least when the latter relate to standards for which a waiver has already been granted. The statute itself only refers to enforcement procedures in connection with the consistency finding. Congress was certainly capable of adding the phrase "accompanying enforcement pro-

[36] Petitioners claim otherwise, contending that the Administrator in fact considered whether the in-use maintenance regulations were as protective of public health and welfare as applicable federal standards, an inquiry inappropriate under the Administrator's analysis here. Petitioners misinterpret what the Administrator did, however. He did *not* examine whether the in-use maintenance regulations were themselves as protective of public health and welfare as applicable federal standards. Rather he explored whether the procedures had a negative effect on the protectiveness of the California standards for which a waiver had already been granted. *See* 43 Fed. Reg. 32183 (1978), *reprinted in* J.A. at 56. This inquiry is perfectly consistent with the Administrator's past practice and his position in this court.

cedures" wherever the word "standards" appeared if it desired the statutory findings to apply to both. We see no reason to assume that its failure to do so is attributable to sloppy draftsmanship, particularly in light of indications in the legislative history that the failure was a deliberate one.[37]

Moreover, the differing treatment accorded standards and enforcement procedures in subsection (b) makes sense, and is consistent with the congressional intent to provide California with the broadest possible discretion in adopting and attempting to enforce emissions standards. The protectiveness determination California must make to request a waiver and the need finding the Administrator must make to deny one are both logically tied to air quality—that is, to conditions in the air which require the regulation of emissions in the first instance. These considerations are prerequisites to California's establishment of its own program of emissions control. The only species of emissions control regulation which directly addresses air quality is a standard. Only a standard describes pollutants and allocates the various risks thereof.

An enforcement procedure, by contrast, does not directly relate to air quality. A certification process without standards cannot protect public health; a particular spark plug change can never be justified by conditions in the environment it does not alone directly affect. If the Administrator was entitled to deny a waiver upon a finding that California did not need a particular enforcement procedure to meet compelling and extraordinary conditions in California, it is unlikely that a contested waiver request would ever be granted. Of course the absence or in-

[37] The Senate Report on the original waiver provision, for example, explained that the only ground on which a waiver for accompanying enforcement procedures could be denied was if the procedures "are in conflict with the intent of Section 202(a)." S. Rep. No. 403, 90th Cong., 1st Sess. 33-34 (1967).

effectiveness of an enforcement program might endanger the ability of the standards to accomplish the levels of emissions they seek, and thus an indirect relationship exists between enforcement procedures and the public health and welfare. Yet the relationship turns on the impact of the enforcement procedures on the effectiveness of the standards. Similarly, the imposition of enforcement procedures that cannot be met in light of technological developments affects the manufacturers' ability to certify motor vehicles that will control pollution for their useful lives. It is therefore logical to condition California's flexibility to adopt enforcement procedures on the manufacturers' capacity to comply with the regulations the State prescribes.

The Administrator has consistently treated standards differently than enforcement procedures in waiver proceedings, and his decision to do so here thus comes as no surprise.[38] This differing treatment antedated the 1977 amendments, and it is noteworthy that Congress expressed general approval of the Administrator's subsection (b) decisions in revising the waiver power.[39] In light of these factors, we are unable to conclude that the Administrator acted unreasonably in limiting the considerations he must address. We accordingly hold that when considering a request for waiver of in-use maintenance regulations pertaining to standards for which a waiver has already been granted the Administrator is not required to consider whether California reasonably determined that the regulations themselves are as protective of public health and welfare as applicable federal standards or whether the regulations themselves are needed to meet compelling and extraordinary conditions in California. His failure to

[38] *See, e.g.*, 43 Fed. Reg. 9344, 9345 (1978); 42 Fed. Reg. 3192, 3194 (1977); 41 Fed. Reg. 44209 (1977); 36 Fed. Reg. 17458 (1971).

[39] H.R. Rep. No. 294, 95th Cong., 1st Sess. 301 (1977).

consider the factors here, therefore, is no basis for setting aside his decision.[40]

B. Constitutional Considerations

Petitioners complain that the in-use maintenance regulations unconstitutionally burden their right to communicate with vehicle purchasers. They also maintain that the regulations alter statutory defenses and impose liability on manufacturers without fault in violation of the due process clause. We address the substance of these arguments at a later point, *see* Part VIII *infra*, and for now are concerned only with petitioners' contention that the Administrator had an obligation to consider these contentions in considering whether to grant the waiver.

It is petitioners' position that the general principles of administrative law and procedure obligate the Administrator to obey the Constitution and to be mindful of constitutional goals. According to petitioners, these ob-

[40] Petitioners suggest that the Administrator was obligated to conduct a cost-effectiveness study on the in-use maintenance regulations as part of his examination of the "cost of compliance." We disagree. As we note below, the "cost of compliance" consideration relates to the timing of standards and procedures. Here the Administrator noted on the record that the manufacturers did not challenge "[t]he CARB estimat[e] that the regulations would . . . resul[t] in a net cost benefit." 43 Fed. Reg. 32184 (1978), *reprinted in* J.A. at 57. This is sufficient for the "cost of compliance" inquiry. In Portland Cement Co. v. Ruckleshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), we rejected the cost-effectiveness requirement with these words:

> However desirable in the abstract, such a [study] requirement would conflict with the specific time constraints imposed on the Administrator. The difficulty, if not the impossibility, of quantifying the benefit of ambient air conditions, further miltates against the imposition of such an imperative on the agency.

This reasoning applies here as well.

ligations require the Administrator to pass on constitutionally-based challenges to the CARB regulations in deciding whether to waive federal preemption for them. As noted, the Administrator regards these constitutional issues as beyond the scope of his review.

We think the Administrator was entitled to refuse to pass on petitioners' constitutional claims.[41] That he like every other administrative officer owes allegiance to the Constitution does not mean that he is required to issue rulings of constitutional dimension. Resolving questions of constitutional scope is the most important of judicial functions, "one that even the judiciary is reluctant to exercise." *Panitz v. District of Columbia*, 112 F.2d 39, 41 (D.C. Cir. 1940). Here the Administrator operates in a narrowly circumscribed proceeding requiring no broad policy judgments on constitutionally sensitive matters. Nothing in section 209 requires him to consider the constitutional ramifications of the regulations for which California requests a waiver. *Cf.* 47 U.S.C. § 326 (1976) ("no regulation or condition shall be promulgated or fixed by the [Federal Communications] Commission which shall interfere with the right of free speech"). Nor need he as an incident to his regulatory authority determine the constitutional applicability of the in-use regulations to particular individuals or circumstances. *Compare Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970) *with Plano v. Baker*, 504 F.2d 595 (2d Cir. 1974).

It is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Johnson v. Robinson*, 415 U.S. 361, 368

[41] We need not decide here whether the Administrator is authorized to deny a waiver on the ground that the proposed Cailfornia regulations are on their face violative of the Constitution.

(1974); L. Jaffe, *Judicial Control of Administrative Action* 438 (ab. ed. 1965). Although petitioners' objections are not directed at the Clean Air Act,[42] the rationale underlying the cases dealing with administrative power to consider challenges to statutes is useful in this context as well. The waiver proceeding produces a forum ill-suited to the resolution of constitutional claims. While nothing in section 209 categorically forbids the Administrator from listening to constitutionally-based challenges, petitioners are assured through a petition for review here that their contentions will get a hearing. Exhaustion of constitutional claims may on occasion be required by statute, *see Weinberger v. Salfi*, *supra*, or by principles of administrative procedure if there is a possibility that the agency will decide in the litigant's favor on *non*constitutional grounds, *see Public Utilities Commission v. United States*, 355 U.S. 534, 539-40 (1958). But when, as here, petitioners have exhausted their administrative remedies, a failure to have raised the constitutional claims before the Administrator would not bar them from asserting the claims to this court.

We conclude that it was not error for the Administrator to decline to examine petitioners' constitutional arguments against the in-use maintenance regulations.[43]

[42] This is only partly true. As noted, section 207 gives the Administrator the power to issue regulations governing in-use maintenance. 42 U.S.C. § 7541(c) (Supp. I 1977). The Administrator has not promulgated such regulations, and hence any constitutionally-based attack on section 207 and its offspring would be premature. Yet were the Administrator to pass on the constitutionality of the CARB's in-use maintenance regulations, he would necessarily be passing on the constitutionality of the power Congress delegated to him in section 207. Thus if the Administrator accepted petitioners' invitation, he would be indirectly violating the principle that administrative agencies generally have no jurisdiction to consider the constitutionality of their organic statutes, *supra*.

[43] Petitioners additionally complain that the Administrator did not provide a "meaningful explanation" of his reasons for

C. Antitrust Considerations

Petitioners [44] insist that the in-use maintenance regulations are anticompetitive because they are designed to reduce the business available to the automotive parts and services industry and because they allegedly create a financial and psychological tie-in (via the warranty provisions) between vehicle purchasers and franchised dealerships in the performance of in-use maintenance. They contend that the Administrator has a duty arising out of the Clean Air Act and general principles of administrative law to consider these claims of anticompetitiveness, and that his decision is unlawful owing to his failure to abide by that duty. As noted, the Administrator held that the antitrust implications of the in-use maintenance regulations were beyond the scope of his review. He did note, however, that the regulations were consistent with section 207, which contains expressions of congressional concern about certain potentially anticompetitive practices.[45]

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not passing on the constitutionally-based claims. This claim is makeweight. The Administrator stated that the constitutional arguments "are beyond the scope of my review, and the waiver hearing is not a proper forum in which to raise them." 43 Fed. Reg. 32185 (1978), reprinted in J.A. at 58 (citation omitted). Although succinct, this statement certainly communicates the basis for the Administrator's decision. *See* Belco Petroleum Corp. v. FERC, 589 F.2d 680, 686 n.6 (D.C. Cir. 1978). He was not required to insert an elaborate legal brief defending his position into the waiver decision.

[44] *See* note 2 *supra*.

[45] 43 Fed. Reg. 32184 (1978), *reprinted in* J.A. at 57-58. The strongest expression of the Administrator's concern appears in his letter denying a request for reconsideration of another waiver decision. This letter is part of the record in these cases. Letter from Douglas Costle to Mark Joelson (November 1, 1978), *reprinted in* J.A. at 1853-55.

Although we think the Administrator must be sensitive to section 207 concerns in approaching a waiver decision, we agree that he has no duty beyond that to consider claims of anticompetitiveness in a waiver proceeding. We base our agreement on three grounds.

First, there is no such thing as a "general duty" on an administrative agency to make decisions based on factors other than those Congress expressly or impliedly intended the agency to consider. The general principles of administrative law and procedure call upon an agency to give reasoned consideration to all facts and issues relevant to the matter at hand, but the determination of what is relevant turns in the first instance on analysis of the express language of the statute involved and the content given that language by implication from the structure of the statute, its legislative history, and the general course of administrative practice since its enactment. An administrative agency has no charter apart from the framework constructed by that analysis to enforce or otherwise consider whatever suits its or someone else's fancy. *See generally International Brotherhood of Teamsters v. Daniel, supra.*

Second, there is no express provision in section 209 or elsewhere in the Clean Air Act requiring the Administrator to assess general claims of anticompetitiveness in his consideration of waiver requests. Section 209 nowhere explicitly refers to anticompetitiveness concerns. Elsewhere in the statute, section 317, 42 U.S.C. § 7617 (Supp. I 1977), requires the Administrator to prepare an economic impact statement investigating anticompetitive concerns before taking certain prescribed actions, but a section 209 waiver is not included among these actions.[46]

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[46] Section 317 provides in pertinent part:

> Notice of proposed rulemaking; substantial revisions
>
> (a) This section applies to action of the Administrator in promulgating or revising—

[Continued]

Even if it were, section 317 provides that nothing therein shall be construed to alter the basis on which any regulation is promulgated, to preclude the Administrator from carrying out his responsibilities to protect the public

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[46] [Continued]

(1) any new source standard of performance under section 7411 of this title,

(2) any regulation under section 7411(d) of this title,

(3) any regulation under part B of subchapter I of this chapter (relating to ozone and stratosphere protection),

(4) any regulation under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality),

(5) any regulation establishing emission standards under section 7521 of this title and any other regulation promulgated under that section,

(6) any regulation controlling or prohibiting any fuel or fuel additive under section 7545(c) of this title, and

(7) any aircraft emission standard under section 7571 of this title.

Nothing in this section shall apply to any standard or regulation described in paragraphs (1) through (7) of this subsection unless the notice of proposed rulemaking in connection with such standard or regulation is published in the Federal Register after the date ninety days after August 7, 1977. In the case of revisions of such standards or regulations, this section shall apply only to revisions which the Administrator determines to be substantial revisions.

Preparation of assessment by Administrator

(b) Before publication of notice of proposed rulemaking with respect to any standard or regulation to which this section applies, the Administrator shall prepare an economic impact assessment respecting such standard or regulation. Such assessment shall be included in the

health and welfare, or to authorize a court to set aside an action of the Administrator on the ground that he failed to assess the economic impact of the action. *Id.* § 7617(e). This last particularly signifies Congress' intent that the

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docket required under section 7607(d)(2) of this title and shall be available to the public as provided in section 7607(d)(4) of this title. Notice of proposed rulemaking shall include notice of such availability together with an explanation of the extent and manner in which the Administrator has considered the analysis contained in such economic impact assessment in proposing the action. The Administrator shall also provide such an explanation in his notice of promulgation of any regulation or standard referred to in subsection (a) of this section. Each such explanation shall be part of the statements of basis and purpose required under sections 7607(d)(3) and 7607(d)(6) of this title.

Analysis

(c) Subject to subsection (d) of this section, the assessment required under this section with respect to any standard or regulation shall contain an analysis of—

(1) the costs of compliance with any such standard or regulation, including extent to which the costs of compliance will vary depending on (A) the effective date of the standard or regulation, and (B) the development of less expensive, more efficient means or methods of compliance with the standard or regulation;

(2) the potential inflationary or recessionary effects of the standard or regulation;

(3) the effects on competition of the standard or regulation with respect to small business;

(4) the effects of the standard or regulation on consumer costs; and

(5) the effects of the standard or regulation on energy use.

Nothing in this section shall be construed to provide that the analysis of the factors specified in this subsection affects or alters the factors which the Administrator is

Administrator's decisions on air quality standards and related matters be immune from attacks like the one at bar.

Third, nothing in section 209 or elsewhere in the Clean Air Act can fairly be read to imply a duty on the Administrator to deny a waiver on the basis of the antitrust implications of California regulations. Petitioners profess to find such a duty in the "public health and welfare" language of sections 209 and 202(a) and in section 202's requirement that the Administrator give appropriate consideration to the "cost of compliance" with the standards. The "public health" provision, they insist, poses a duty comparable to that found in other administrative statutes that require agencies to take ac-

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required to consider in taking any action referred to in subsection (a) of this section.

Extensiveness of assessment

(d) The assessment required under this section shall be as extensive as practicable, in the judgment of the Administrator taking into account the time and resources available to the Environmental Protection Agency and other duties and authorities which the Administrator is required to carry out under this chapter.

Limitations on construction of section

(e) Nothing in this section shall be construed—

(1) to alter the basis on which a standard or regulation is promulgated under this chapter;

(2) to preclude the Administrator from carrying out his responsibility under this chapter to protect public health and welfare; or

(3) to authorize or require any judicial review of any such standard or regulation, or any stay or injunction of the proposal, promulgation, or effectiveness of such standard or regulation on the basis of failure to comply with this section.

42 U.S.C. § 7617 (Supp. I 1977).

count of the "public interest" in making decisions. The "cost of compliance" provision, they say, compels appropriate consideration of the "social costs" of pollution control. We think these contentions stretch the effective scope of those provisions well beyond their reasonably inferrable reach.

As our earlier discussion of the content of the word "standards" in section 209 intimated, the phrase "public health and welfare" is directly related to the effects of pollution on the environment. Congress enacted the Clean Air Act as an attempt to improve the quality of the air. This concern with pollution was not confined to its adverse effects on humans, but extended as well to its impact on the economy.[47] The terms "public health and welfare" thus encompass economic values, but only to reflect the economic costs of pollution, not the social costs of pollution control. This is evident in every context in which the terms appear. *See, e.g.*, 42 U.S.C. § 7521(a) (Supp. I 1977); *id.* § 7543(b); *id.* § 7409(b)(2); *id.* § 7571(a)(2); *id.* § 7401; *id.* § 7403(f); *id.* § 7405(a); *id.* § 7408(a); *id.* § 7450. When Congress intended the Administrator to go beyond the effects of pollution and examine as well the effects of pollution control it made its intent apparent. This is strikingly evident in section 317, which

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[47] The House Report on the 1977 amendments noted:

The committee recognizes that air pollution causes significant economic costs to the public by damaging health and welfare. Such costs include an increased incidence of illness, premature death, increased expenditures for health care and insurance and loss of tax revenues. Additionally, it causes damage to real estate and crops (and other vegetation), and could result in huge economic losses for tourist-related industries. While quantifications of these losses is obviously difficult, some estimates range as high as $16.1 billion annually (in 1968 dollars).

H.R. Rep. No. 294, 95th Cong., 1st Sess. 34 (1977).

carefully distinguishes between protection of the public health and welfare and concern with anticompetitiveness. *See id.* § 7617(e).

Similarly, there is no indication that Congress intended section 202's "cost of compliance" consideration to embody "social costs" of the type petitioners advance. Every effort at pollution control exacts social costs. Congress, not the Administrator, made the decision to accept those costs. Section 202's "cost of compliance" concern, juxtaposed as it is with the requirement that the Administrator provide the requisite lead time to allow technological developments, refers to the economic costs of motor vehicle emission standards and accompanying enforcement procedures. *See* S. Rep. No. 192, 89th Cong., 1st Sess. 5-8 (1965); H.R. Rep. No. 728, 90th Cong., 1st Sess. 23 (1967). It relates to the *timing* of a particular emission control regulation rather than to its social implications. Congress wanted to avoid undue economic disruption in the automotive manufacturing industry and also sought to avoid doubling or tripling the cost of motor vehicles to purchasers. It therefore requires that emission regulations be technologically feasible within economic parameters. Therein lies the intent of the "cost of compliance" requirement.

The cases petitioners cite in which the Supreme Court has imposed a duty to consider anticompetitive effects under general statutory directives to protect the "public interest" are inapposite here. Indeed they confirm our view that the general terms of a statute derive their content from the context in which the terms appear.

The Supreme Court's decision in *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747 (1973), is instructive. That case involved section 204 of the Federal Power Act, which provides that no public utility shall issue a security "unless and until, and then only to

the extent that" the Federal Power Commission approved. 16 U.S.C. § 824c(a).[48] The Commission is authorized to approve an issue "*only* 'if it finds that such issue . . . is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest.'" 411 U.S. at 756 (quoting 16 U.S.C. § 824c(a)) (emphasis in original). Stressing this language, the Supreme Court rejected the Commission's view that it need not consider anticompetitive implications. The Federal Power Act, the Court explained, "was passed in the context of, and in response to, great concentrations of economic and even political power vested in public trusts, and the absence of antitrust enforcement to restrain the growth and practices of public utility holding companies." *Id.* at 758. The Commission's power was correspondingly "broad and impressive" and was intended to "curb abusive practices" and to "provide effective federal regulation of the expanding business" of selling electric power. *Id.* at 756, 758.

Likewise, in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), another case on which petitioners chiefly rely, the Supreme Court approved the Federal Maritime Commission's reliance on antitrust policy to regulate shipping conference agreements under a public interest standard only after finding that reliance appropriate in light of the expressed congressional intent. Section 15 of the Shipping Act gives the Commission broad power to "disapprove, cancel or modify any agreement, or any modification thereof . . . that it finds to be unjustly discriminatory or unfair . . . or to operate to the detriment of the commerce of the United States, or to be contrary to

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[48] The Federal Power Commission is no longer in existence. Its responsibilities have been transferred to the Secretary of Energy, 42 U.S.C. § 7151 (Supp. I 1977), and the Federal Energy Regulatory Commission, *id.* § 7172.

the public interest." 46 U.S.C. § 814. Agreements approved by the Commission are exempt from the antitrust laws. *Id.* Taking its cue from the legislative history, the Supreme Court explained that Congress had concluded that the advantages of regular shipping service, uniform and stable rates, and efficient service could not be achieved in the face of unrestricted competition and had therefore created the exemption. But, the Court said, the exemption was not an unqualified gift to the shipping industry; that is, it did not amount to a license to violate the antitrust laws when the object of the unlawful activity was unrelated to the goals the exemption was intended to serve. The Court said that Congress had authorized the Commission to disapprove agreements under the public interest standard on the ground that their anticompetitive implications outweigh benefits related to the statutory goals. *Id.* at 242-46.[49]

The EPA Administrator does not have authority to regulate either the motor vehicle manufacturing industry or the State of California under a broad charter to advance the public interest. The phrase "the public interest" does not even appear in sections 202 and 209. The Clean Air Act does not have its genesis in congressional concern about business competition or antitrust matters. The motor vehicle manufacturers enjoy no exemption from the antitrust laws. As the Administrator has consistently held since first vested with the waiver authority, his inquiry under section 209 is modest in scope. He has no "broad and impressive" authority to modify California regulations.

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[49] The other cases to which petitioners refer do not warrant extended discussion. Like *Amerika Linien*, United States Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978), involved the Shipping Act; like *Gulf State Utilities*, Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968), involved the Federal Power Act. Each of these cases turned on the broad "public interest" standard under which the FMC and the FPC

The Administrator's decision to waive federal preemption for the in-use maintenance regulations does no violence to the concerns about anticompetitiveness reflected in section 207. Nothing in that section forbids encouraging the production of more durable emission-related parts. Congress' intent was to prohibit manufacturers from requiring that maintenance on warranted parts be done by the manufacturer and franchised dealerships.[50] The CARB's regulations do not favor one segment of the parts and services industry over another; they are neutral on where the maintenance will be done. They will therefore have no direct effect on the vehicle owner's decision to patronize the original equipment manufacturer or the aftermarket industry at the time any component needs to be replaced. Petitioners' complaint is really with

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(now FERC) operate and on the legislative history of the statutes indicating congressional intent to include antitrust policy within the scope of that standard. McLean Trucking Co. v. United States, 321 U.S. 67 (1944), is clearly inapposite, for in that case the Court did not even have to imply the content of the ICC's "public interest" standard from the structure of the statute or its legislative history; Congress had expressly declared that antitrust policy was to be a factor in the ICC's determinations. *See* 321 U.S. at 82 & n.16.

[50] The CARB's regulations do not violate section 207(c)(3)(B), which directs that the written instructions

> shall not include any condition on the ultimate purchaser's using, in connection with such vehicle or engine, any component or service (other than a component or service provided without charge under the terms of the purchase agreement) which is identified by brand, trade, or corporate name; or directly or indirectly distinguishing between service performed by the franchised dealers of such manufacturer or any other service establishments with which such manufacturer has a commercial relationship, and service performed by independent automotive repair facilities with which such manufacturer has no commercial relationship.

42 U.S.C. § 7541(c)(3)(B) (Supp. I 1977); *see* note 68 *infra*.

the warranty obligations themselves, and they must address those complaints to Congress, which created the obligations, rather than to the Administrator.

V

THE WAIVER PROCEEDING

We have determined that in a section 209 proceeding involving accompanying enforcement procedures relating to standards for which a waiver has already been granted the Administrator must address (1) whether the procedures endanger the protectiveness of California's standards and (2) whether the procedures are consistent with the intent of section 202(a). The next question for decision requires us to resolve how the Administrator must go about addressing these concerns.

On petitioners' analysis, section 209(b) imposes on California the burden of demonstrating that the waiver is lawful and further requires the Administrator to find on the record that California has met this burden. This last requirement, say petitioners, requires the Administrator to find that the California *regulations* are not arbitrary and capricious and are consistent with section 202(a) before granting the waiver. The Administrator contends that those favoring denial of the waiver carry the burden of demonstrating that the waiver should not be granted, and that his obligation is to grant the waiver if that burden is not met.

Our starting point is the statute. Subsection (b) begins: "The Administrator *shall*, after notice and public hearing, *waive* application" of federal preemption for California "if the *State* determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b) (Supp. I 1977) (emphasis added). The only pre-waiver conditions this language

imposes are that the Administrator find that California has made a protectiveness determination and that he hold a public hearing. It does not require *him* to find that the standards are at least as protective of public health and welfare as applicable federal standards. It does not say he "may" grant a waiver once California makes the determination and he holds a public hearing. It instead contains an imperative to do an act—*grant* the waiver after a hearing—once California has made the protectiveness determination.

The requirement of a public hearing is a clue that his task is something more than ministerial. The second sentence of subsection (b) confirms the suspicion. It provides that the Administrator must deny the waiver if he makes one of three findings—that the *protectiveness determination* (as opposed to the regulations which protect) was arbitrary and capricious; that the State does not need the standards; or that the standard and enforcement procedures are inconsistent with section 202(a). It is not necessary for the Administrator affirmatively to find that these conditions do not exist before granting a waiver. The statute does not say "the Administrator shall grant a waiver only if" he makes the negative of these findings. That he must deny a waiver if certain facts exist does not mean that he must independently proceed to make the opposite of those findings before he grants the waiver regardless of the state of the record. If the Administrator has an obligation to deal with these factual findings it must arise out of the public hearing held to discuss them. The language of the statute and its legislative history indicate that California's regulations, and California's determination that they comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing, and thereafter the parties opposing

the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.

As noted, the legislative history makes clear that the burden of proof lies with the parties favoring denial of the waiver. Petitioners lost the battle they now wage twelve years ago when Congress specifically declined to adopt a provision which would have imposed on California the burden to demonstrate that it met the waiver requirements. As noted, the Senate version of the Air Quality Act of 1967 contained the language which was ultimately adopted by Congress. It vested the power to make the protectiveness determination in California and sharply restricted the Secretary's role in a waiver proceeding. The Senate Report explained that under the proposal the "Secretary is *required* to waive application *unless* he finds" one the factual circumstances set out in section 209(b)(1)(A)-(C). S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967) (emphasis added).

The House Committee changed this arrangement. It was persuaded by the comments of manufacturers that the separate administration of two different sets of emission regulations would unduly burden the industry. H.R. Rep. No. 728, 90th Cong., 1st Sess. 21-22 (1967). It therefore amended the Senate's language to provide that the Secretary "may" waive application of the preemption provision "upon a showing by California" that its standards were more stringent than applicable federal standards. *Id.* at 22; *see id.* at 69. In a separate statement accompanying the House Committee Report which explained this amendment, two Representatives vigorously protested this change, complaining that it improperly placed the burden on California to demonstrate the value of the waiver and thereby undermined the importance of the California exception. *Id.* at 96 (separate views of Reps. Moss and Van Deerlin).

On the floor of the House one of these dissenting Committee members offered an amendment to the bill which replaced the Committee language with the Senate proposal. 113 Cong. Rec. 30975 (1967) (remarks of Rep. Moss). The ensuing debate focused on the wisdom and need of requiring California to justify each of its emission control regulations to a federal officer.[51] At the close of the debate, the House adopted the amendment, thereby rejecting language which would have imposed the burden on California and accepting language which places the burden on those who allege, in effect, that the na-

[51] In their reply brief, petitioners suggest that the history of the 1967 enactment "is ambiguous on the question of the burden of persuasion," citing one remark of "a supporter of the version of Section 209(b) adopted in 1967" to the effect that "California 'would have the burden of proof.'" Joint Reply Br. of Petitioners at 19 n.12 (citing 113 Cong. Rec. 30979 (1967) (remarks of Rep. Harvey)). In fact, while remarks of some Congressmen are not always authoritative, the legislative history could not be less ambiguous on this question. The precise issue of the difference between the Senate and House versions of the bill as it related to the burden of persuasion was carefully explained on the floor. *See* 113 Cong. Rec. 30950 (1967) (remarks of Rep. Holifield). After Rep. Moss offered his amendment to the House Committee version, explaining that it contained "the same language, word for word, as was adopted unanimously by [the Senate]," *id.* at 30975, several other members again explained the difference between the House Committee version and the Senate version, specifically emphasizing that California carried the burden under the former but not the latter, *see, e.g.*, 113 Cong. Rec. 30976 (1967) (remarks of Rep. Wilson); *id.* at 30977 (remarks of Rep. Roybal). The comment to which petitioners advert was made during the debate on the Moss amendment by a member who rose *in opposition* to that amendment, *id.* at 30979 (remarks of Rep. Harvey), and was part of his persistent effort to minimize the difference between the two versions, *see id.* at 40952 (remarks of Rep. Harvey). The House found those efforts unconvincing, and we must abide by that judgment.

tional program is adequate to California's needs. The Administrator has consistently adhered to that choice since then, *see, e.g.*, 40 Fed. Reg. 30311, 30314 (1975), and Congress expressed general approval of the Administrator's waiver decisions in amending section 209 in 1977, *see* H.R. Rep. No. 294, 95th Cong., 1st Sess. 301 (1977).[52]

Petitioners have an opportunity to meet this burden at the hearing the Administrator must conduct before granting a waiver. If they have a case—if in fact the circumstances exist in which Congress declared that "no such waiver shall be granted"—then petitioners have nothing to fear, for the hearing cannot be and is not an idle exercise. The Administrator is not entitled to ignore the evidence adduced at the hearing. He must consider all evidence that passes the threshold test of materiality and he must thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown that the factual circumstances exist in which Congress intended denial of the waiver.

The standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved.[53] We need

[52] It is noteworthy that this allocation of the persuasion burden is consistent with general principles governing allocation of burdens. Because section 209 requires the Administrator to grant a waiver unless he makes certain findings, the denial of the waiver is the order to be promoted in a waiver proceeding. Proponents of an order usually bear the burden of showing the order is appropriate. *See* K. Davis, *Administrative Law Treatise* § 6:15 (2d ed. 1978). Here petitioners are the proponent of the order denying the waiver. Similarly, the burden of proof typically follows the party in control of the relevant information. When technological feasibility is in issue, the manufacturers are the ones in possession of the relevant information.

[53] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 642 (D.C. Cir. 1973); K.C. Davis, *supra* note 52, § 6:15.

not decide how this standard operates in every waiver proceeding. Since this proceeding involved enforcement procedures, the only findings of relevance are whether the procedures impact on California's protectiveness determination and whether they are consistent with section 202's concern with technological feasibility. The Administrator held that there must be "clear and compelling evidence" to show that proposed procedures undermine the protectiveness of California's standards, and this holding has strong support in the legislative history.[54] It also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare. The Administrator did not expressly describe a standard of proof for the section 202(a) inquiry, but we have elsewhere held that the "preponderance of the evidence" standard governs inquiry into technological feasibility,[55] and we do not understand the Administrator to dispute that measurement here. This standard accords with Congress' intent to minimize economic disruption in manufacturing.

The public hearing on California's waiver request, and the record displaying the evidence adduced therein, ensure that a court will be able to conduct meaningful review of the Administrator's waiver decisions. This is the concern animating our decision in *International Har-*

[54] The House Report on the 1977 amendments cautioned:

> The Administrator . . . is not to overturn California's judgment lightly. Nor is he to substitute his judgment for that of the State. There must be *clear and compelling evidence* that the State acted unreasonably in evaluating the relative risks of various pollutants in light of the air quality, topography, photochemistry, and climate in the State, before the EPA may deny a waiver.

H.R. Rep. No. 294, 95th Cong., 1st Sess. 302 (1977).

[55] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 642 (D.C. Cir. 1973).

vester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973), which each of the parties attempt to embrace as their own. In that case, the EPA denied an application for suspension of emission standards sought under a provision of the Clean Air Act which imposed on the applicant the burden of demonstrating the unavailability of effective control technology. The statute explicitly placed the burden of persuasion on the applicants. The standard of proof the applicants had to meet was a preponderance of the evidence. Noting that the applicants had submitted all the data in their possession *and* that the Administrator did not ask for more, the court was disturbed by the fact the Administrator had relied on his own methodology and predictions in arriving at a factual determination contrary to the applicants' data. Believing that the applicants had met the standard of proof with their data, the court held that the burden of proof shifted to the Administrator to demonstrate that his methodology and predictions were reliable. *Id.* at 642-43.

International Harvester's reasoning represented neither a substantive judgment that the emission standards were in fact beyond current and projected technological capabilities nor a strictly procedural judgment that the burden shifts as it might in a normal civil trial setting. Rather the use of the burden of proof was meant to structure and facilitate judicial review. The burden "shifted" to the agency as a necessary incident of its obligation to give reasoned consideration to the issues before it. The Administrator, the court said, must sustain the "burden of adducing a reasoned presentation supporting the reliability of the EPA's methodology." *Id.* at 643. That is, he had to explain why his methods were superior to the data the applicants had submitted and thereby adequate to support the agency's rejection of the applicant's data. Only with such an explanation could the court determine whether the Administrator had acted reasonably.

Here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assertions of his own, he runs the risk of having his waiver decision set aside as arbitrary and capricious. His "burden" is the burden of acting reasonably.[56]

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[56] As we noted in the preface to our analysis, the Administrator like every other administrative officer must give reasoned consideration to the issues before him, but the extent of the consideration he is required to give depends on the statute under which he is operating. This principle explains why this case differs from those petitioners cite in support of their argument that the Administrator has an affirmative obligation to make negative findings. Thus, for example, our holdings that agencies required to prepare environmental impact statements under the National Environmental Policy Act cannot sit back, "like an umpire, and resolve adversary contentions" presented to them turn on the fact that NEPA places primary responsibility for its enforcement in the hands of the agencies. *See* State of Alaska v. Andrus, 580 F.2d 465, 473 (D.C. Cir. 1978) ; Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 449 F.2d 1109, 1119 (D.C. Cir. 1971). NEPA "states that every federal agency *shall* consider ecological factors when dealing with activities which may have an impact on man's environment." Zabel v. Tabb, 430 F.2d 199, 211 (5th Cir. 1970) (emphasis added). Similarly, in the other case petitioners cite, Citizens Committee to Save WEFM v. FCC, 506 F.2d 252 (D.C. Cir. 1974) (en banc), we held that the FCC's performance of its regulatory role did not depend "upon the assiduousness" of private parties because the agency had a "mandate to approve applications consistent with the public interest." *Id.* at 262 n.21. These cases do not hold that regardless of the statute involved the agency always bears the burden of demonstrating a particular state of facts exist. Rather they turn on the special mandate involved. Here the Administrator has no broad mandate to assure that California's emissions control program conforms to the Administrator's perceptions of the public interest. Absent the contingency that he is able to make contrary findings, his role with respect to the California program is largely ministerial.

VI

THE WAIVER DECISION

It remains to be seen whether there is a discernible rational basis for the Administrator's decision to waive federal preemption for the in-use maintenance regulations. In light of the foregoing, this leaves two matters for consideration. First, did the Administrator reasonably conclude that there was no clear and compelling evidence to show that the regulations would undermine the protectiveness determination California made with respect to the standards to which the regulations relate? Second, did the Administrator reasonably conclude that petitioners failed to meet their burden of demonstrating that the in-use maintenance regulations were inconsistent with the intent of section 202(a)?

A. *The Protectiveness Determination*

Almost all petitioners' assertions on this point relate to the Administrator's failure to explore whether the in-use maintenance regulations were themselves arbitrary and capricious, which as noted is not a question for the Administrator or this court. Once California has come forward with a finding that the procedures it seeks to adopt will not undermine the protectiveness of its standards, parties opposing the waiver request must show that this finding is unreasonable. Petitioners claim to have done so, but we can find no evidence in the record to support that assertion.

Petitioners refer to four documents in the record ostensibly related to the effect of the standards on public health and welfare. The first is a letter from a representative of General Motors Corporation to the EPA which declares that the major issue in the waiver proceeding ought to be whether California needed the in-use

maintenance regulations.[57] Setting aside the fact that this assertion relates to an inquiry not relevant to a waiver involving enforcement procedures, the statement itself is not evidence but an argument. The letter advances General Motors' "belief" that the in-use regulations might imperil the protectiveness of California's standards, but it offers no evidence to support that belief. In light of the voluminous record developed before the CARB and the EPA, it is not unreasonable, if the claim were true, to expect that petitioners should be able to point to some data backing up that assertion.

The second document is also a product of General Motors and also predominately relates to the "need" inquiry that is inapplicable to this proceeding.[58] This document too fails to point to any evidence regarding the risks ostensibly attending the regulations and instead focuses on the allegedly flawed studies the CARB undertook to demonstrate the public health benefits of the in-use maintenance regulations. There is certainly room for disagreement about the potential benefits of the in-use maintenance regulations; the CARB staff conceded that it could not precisely identify the emissions-related benefits to be derived from the regulations alone.[59] Moreover,

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[57] Letter from T.M. Fisher to Benjamin R. Jackson (August 26, 1977), *reprinted in* J.A. 1281-82 (cited in Joint Br. for Petitioners at 59, 65).

[58] General Motors Corp., Analysis of Reports Used by the California Air Resources Board to Support the Restricted Maintenance Regulations 5-8 (submitted to the EPA February 1978), *reprinted in* J.A. at 1803-06 (cited in Joint Br. for Petitioners at 59, 65).

[59] *See* California Air Resources Board, Staff Report No. 77-12-1, 19-28 (May 26, 1977), *reprinted in* J.A. at 180-89; California Air Resources Board, Staff Report No. 77-9-2, 21-28 (April 28, 1977), *reprinted in* J.A. at 146-53. Coupling the other new regulations (such as inspection procedures)

there is room for disagreement about the exact meaning of the studies used by the CARB. But we cannot substitute our judgment about this data for that of the officials charged with interpreting it.

The other two documents petitioners cite are similarly inadequate. One is an unsupported assertion made by a representative of the Ford Motor Company relating to the potential public health effects of the in-use maintenance regulations.[60] The other has nothing to do with

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with its new maintenance regulations, the CARB staff predicted a reduction in:

> hydrocarbons by 4 tons/day, carbon monoxide by 73 tons/day, and oxides of nitrogen by 3 tons/day in the South Coast Air Basin in 1990. These reductions represent 1.5%, 2.5%, and 0.5% of the total motor vehicle emissions at that time . . . . In addition, the proposed maintenance regulations will strongly enhance public acceptance for the [Motor Vehicle Inspection Program], and increase the chances for its success.

California Air Resources Board, Staff Report No. 77-12-1, *supra*, at 28, J.A. at 189. We have no basis other than petitioners unsubstantiated say-so that this prediction is not trustworthy.

[60] Environmental Protection Agency, Transcript of Public Hearing on California Waiver Request 133 (Aug. 3, 1977) (statement of Ms. Petrauskas), *reprinted in* J.A. at 3413 (cited in Joint Br. for Petitioners at 59). The following colloquy appears in the record immediately following this statement:

> MR. KRUSE [Member, EPA Hearing Panel]: What is your reaction to the data CARB presented which indicates your recommended maintenance is not being performed by the vehicle owners?
>
> MR. WEAVER [Emissions Planning Associate, Ford Motor Co.]: I guess we have to accept that some of that is true, and where it has been demonstrated that this lack of maintenance is contributing to air quality problems, we are doing everything we can to produce maintenance-free parts.
>
> MR. KRUSE: Do you have any data of your own which you can supply?
>
> MR. WEAVER: No.

public health at all, but instead appears to be an examination of the technological feasibility of the proposed regulations.[61]

The Administrator did not specifically discuss any of these documents in his waiver decision; he simply held that there was no evidence in the record to support a finding that the regulations undermined the protectiveness of the California standards. Having reviewed the documents petitioners insist suggest otherwise, we agree with the Administrator.

B. *Technological Feasibility*

We find it necessary to address only three of the claims petitioners advance under this heading.[62]

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[61] General Motors Corp., Statement to the California Air Resources Board on Proposed Changes in Allowable Maintenance 8-10 (May 26, 1977), *reprinted in* J.A. at 3310-12 (cited in Joint Br. for Petitioners at 65).

[62] We have already disposed of petitioners' argument that the "cost of compliance" consideration requires the Administrator to develop a cost-effectiveness study of the in-use maintenance regulations. *See* note 40 *supra*.

In a separate brief, intervenor The Automobile Importers of America ("AIA") argues that the Administrator ignored the need of manufacturers of imported motor vehicles for adequate lead time to comply with the regulations. Its complaint is based on the fact that most importers have not yet begun to use breakerless high-energy ignition systems, which are important in extending the useful life of spark plugs and otherwise reducing the maintenance needed for other ignition parts. AIA refers to no evidence supporting its assertion that it will not have the adequate lead time to incor-

First, petitioners complain that the Administrator "failed to consider—and certainly did not address—the fundamental technological issue raised by the manufacturers: the reliability of [the C]ARB's methodology." Joint Br. for Petitioners at 72. It is important in understanding this claim to appreciate petitioners' dilemma: The restrictions on allowable maintenance are the same in-use as they are during the certification process. Yet petitioners do not here challenge the applicability of the regulations to certification. They thus are in the position of having to argue that while it is technologically feasible to construct a prototype vehicle that will pass certification testing and receive a certificate of conformity, it is not technologically feasible to construct a motor vehicle based on the prototype which will meet the standards and procedures in actual use.

Petitioners say that the problem with basing in-use feasibility judgments on certification test procedures is that the latter does not take account of deterioration over time, weather conditions, and the like—that is, those things which affect a motor vehicle in actual use but which are not considered during certification. For example, the prototype used during certification is subjected only to a mileage interval test; our technology does not yet permit the simulation of time. Nor do certification procedures test for extreme driving conditions, or changes in climate. Petitioners contend that manufacturers commonly make maintenance recommendations

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porate the newer ignition system. The record shows that the newer system itself is "virutally [an] off-the-shelf ite[m]." California Air Resources Board, Staff Report No. 77-12-1, 18 (May 26, 1977), *reprinted in* J.A. at 179. Its argument is therefore unpersuasive.

The balance of the manufacturers' technological feasibility arguments not discussed herein are either moot, *see* note 64 *infra*, or based on undocumented assertions that do not merit discussion.

based on such factors. They contend that the CARB study is fatally flawed because it completely ignores the maintenance needed to take account of factors peculiar to actual driving conditions in favor of reliance on maintenance needed during a procedure that does not accurately reflect actual driving conditions. This focus, petitioners maintain, is inherently unreliable and undermines the foundation of the CARB's conclusion that the regulations are in fact technologically feasible.

Petitioners' argument hails from *International Harvester*. As noted, in that case the EPA interposed a methodology of its own to demonstrate that effective control technology would be available when needed; it used this methodology to offset the manufacturers' contrary data. The court held that the EPA had the "burden" of demonstrating that its methodology was sufficiently reliable to permit a finding of technological feasibility. Wrapping themselves in the cloth spun by this reasoning, petitioners contend that the Administrator carries the burden of demonstrating the reliability of the CARB's technological feasibility studies.

The cloak petitioners purport to see in *International Harvester* does not exist. It is initially noteworthy that the study to which petitioners refer was by no means the sole basis for the CARB's conclusions. The recommendations based on that study were significantly altered after continued examination and solicitation of comments from manufacturers.[63] More important, the question for the Administrator is not whether the CARB's data is re-

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[63] *See* notes 15 & 16 *supra*. Still, the CARB did rely on mileage intervals to shape its in-use maintenance regulations. to set aside the Administrator's decision to waive the regulations, however, this court requires persuasive evidence that the manufacturers cannot comply with them in light of current and projected technology. On this record, the manufacturers have failed to advance any evidence attesting to that.

liable, but whether the manufacturers' current and projected capabilities permit them to meet the in-use maintenance regulations. It was incumbent upon the manufacturers to come forward with *evidence* that the regulations were technologically infeasible. As in *International Harvester*, the Administrator's reliance on other data is germane only if the manufacturers have produced such evidence. If the record does not yield evidence of technological infeasibility, petitioners lose.

Second, petitioners claim that they did indeed demonstrate technological infeasibility. There is little evidence in the record to support that assertion, however. Most of petitioners' fears turn on the manufacturers' earlier inability to recommend maintenance to purchasers—recommendations which they wanted to make to reflect actual in-use driving conditions—but these complaints have since become moot.[64] The only *evidence* in the record tending to show inadequate lead time is some test data indicating a significant decrease in drive belt tension after initial operation, data which might lead to the conclusion that the CARB's estimates on maintenance intervals for drive belt tension are unrealistic. As the Administrator pointed out, however, the same evidence indicated that the drive

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[64] *See* note 18 *supra*. One argument was that if manufacturers could not recommend maintenance there would be no assurance that certain parts (particularly air filters, fuel filters, hoses and tubing) would last for the specified mileage. Another related to possible safety implications of restricting recommended maintenance. The CARB's emergency amendments permit manufacturers to recommend additional maintenance, and thus these arguments are no longer properly before us.

Because we find the manufacturers did not meet their burden on the alleged inconsistency of the in-use maintenance regulations with section 202(a), we need not discuss whether the Administrator acted improperly in relying on an EPA staff synopsis of the waiver proceeding record.

belt tension stabilized after the initial period and the greatest drop-off occurred during the first twenty miles of the vehicle's use. On this basis the Administrator concluded that a pre-sale dealer check of the drive belt tension would relieve the manufacturers' complaint. We can find no other evidence in the record supporting a conclusion of inadequate lead time for the requisite technology.

Third, petitioners assert that the Administrator should have found the in-use maintenance regulations inconsistent with the intent of section 202(a) because the CARB made no showing that more durable parts will lead to effective emissions control and because the in-use maintenance regulations will inhibit the development of emission-related technology. We fail to see how these assertions relate to technological feasibility. The first proposition—that there is no evidence to support the idea that more durable parts will lead to effective emissions control—rests on some data indicating that short replacement intervals for spark plugs reduces emissions. This may be true, but it does not mean that spark plugs cannot be equally effective on longer maintenance intervals, or for that matter, that the manufacturers cannot build the spark plugs to last the longer interval. The second proposition—that the regulations will inhibit the development of new emissions technology—rests on the idea that because new technology generally requires more maintenance manufacturers will not develop it. This is, as the Administrator aptly labeled it, "speculation." It is also improbable given the clear economic incentive for manufacturers to develop and improve emissions control technology.

VIII

The Constitutional Arguments

We need not linger long on our final inquiry. Petitioners make two constitutionally-based challenges to the

Administrator's waiver decision and its consequences. These challenges are without merit.

Petitioners' first amendment claim is that the in-use maintenance regulations unlawfully burden the manufacturers' right to communicate with their customers. We disagree. The regulations permit manufacturers to recommend maintenance reasonable and necessary to ensure the safe operation of the motor vehicle.[65] Otherwise the regulations simply require manufacturers to make clear that maintenance which is *required* for warranty purposes and that which is merely *recommended.* Although commercial speech is now protected by the first amendment,[66] regulation of such speech having a reasonable basis in a legitimate governmental policy is lawful.[67] The CARB determined that the failure of in-use vehicles to meet emissions standards was partly tied to the amount of maintenance a vehicle owner performs (or fails to perform) on emission-related parts. The animating concern was with air quality, a legitimate object of governmental attention. It decided to address this problem by reducing the amount of maintenance needed to be performed on emission-related parts and thereby encourage the production of more durable parts. As part of this effort, it decided to limit the amount of maintenance a manufacturer can demand of motor vehicle owners. Congress contemplated a comparable limitation in enacting section 207. This limitation is reasonably related to a

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[65] *See* note 18 *supra.*

[66] Bates v. State Bar of Arizona, 433 U.S. 350, 363-66 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761-70 (1976).

[67] Banzhaf v. FCC, 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969); *cited with approval in* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976); *see* Young v. Mini Theatres, Inc., 427 U.S. 50, 68 (1975).

legitimate governmental goal. It therefore passes constitutional muster.

As for petitioners' due process claim, it is well settled that Congress is entitled to create statutory rights and liabilities that are rationally related to a legitimate governmental interest.[68] It did so in section 207. The California in-use maintenance regulations do not alter the statutory defenses to those liabilities. Instead they make those defenses consistent with California's determination that motor vehicles can be designed to be operated with less maintenance than is currently the case. That this determination does not meet with the manufacturers' expectations or desires is no basis for holding the regulations unconstitutional.

IX

Conclusion

Congress has decided to grant California the broadest possible discretion in adopting and enforcing standards for the control of emissions from new motor vehicles. Section 209 of the Clean Air Act requires the Administrator to waive federal preemption of motor vehicle emission control standards and accompanying enforcement procedures for the State of California unless he makes certain findings that such a waiver is inappropriate. This power encompasses the power to waive federal preemption for in-use maintenance regulations designed as en-

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[68] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976); Lichter v. United States, 334 U.S. 742 (1948).

Like the first amendment claim, this argument too is partly moot owing to the CARB's emergency amendments. *See* notes 18 & 64 *supra.* Moreover, like certain of the petitioners' other contentions, this argument partly draws support on proposed warranty regulations which the CARB has adopted. The Administrator has not waived preemption of these regulations, however, and hence they are not properly before us.

forcement procedures for pre-existing standards. In evaluating whether a waiver is appropriate for enforcement procedures relating to standards for which a waiver has already been granted, the Administrator is required to address whether the procedures endanger the protectiveness of California's standards and whether the procedures are consistent with section 202(a) of the Clean Air Act. Those favoring the denial of the waiver carry the burden of demonstrating that the waiver is inappropriate. The petitioners here failed to carry that burden. Their request to set aside the Administrator's waiver decision is therefore denied. It is

So ordered.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

Filed Aug 7 1979

No. 78-1896

The Motor and Equipment Manufacturers Association, Inc., *Petitioner*

v.

Environmental Protection Agency and
Douglas Costle, Administrator,
Environmental Protection Agency, *Respondents*

Automobile Importers of America
and State of California, *Intervenors*

No. 78-1901

Automotive Service Industry, et al., *Petitioners*

v.

Environmental Protection Agency, *Respondent*

State of California and Automobile Importers of America,
Intervenors

No. 78-1931

Motor Vehicle Manufacturers Association of the United States, Inc., *Petitioner*

v.

Douglas M. Costle, Administrator of the
Environmental Protection Agency
Environmental Protection Agency, *Respondents*

State of California and Automobile Importers of America,
Intervenors

No. 78-1896, 78-1901, 78-1931,
78-1943 & 78-1944

No. 78-1943

Chrysler Corporation, *Petitioner*

v.

Environmental Protection Agency, *Respondent*

State of California and Automobile Importers of America,
Intervenors

No. 78-1944

General Motors Corporation, *Petitioner*

v.

United States Environmental Protection Agency and Douglas M. Costle, Administrator of the United States Environmental Protection Agency, *Respondents*

State of California and Automobile Importers of America,
Intervenors

ORDER

It is ORDERED, by the Court, *sua sponte,* that the Opinion for the Court filed in the above captioned cases on August 3, 1979 be, and it hereby is, amended as follows:

On page 19 of the slip opinion, on the final line of footnote 19, after the word "control" and before the word "*initio*", strike "*ad*" and insert in lieu thereof "*ab*".

No. 78-1896, 78-1901, 78-1931,
78-1943 & 78-1944

On page 21 of the slip opinion, on the second line of the page, after the word "be" and before the word "or", strike "imperative" and insert in lieu thereof "inoperative".

On page 28 of the slip opinion, on the eleventh line of the second full paragraph, after the word "and" and before the word "implications", strike "anti-trust" and insert in lieu thereof "antitrust".

On page 51 of the slip opinion, on the third to the last line of footnote 51, after the word "at" and before the character and word "(remarks", strike the number "40952" and insert in lieu thereof "30952".

On page 53 of the slip opinion, on the final line of footnote 54, after the characters and numbers "(1977)" and before the period, insert: "(emphasis added)".

On page 61 of the slip opinion, on the third line of footnote 63, at the start of the line and before the word "set", strike the word "to" and insert in lieu thereof the word "To".

Per Curiam

FOR THE COURT:

GEORGE A. FISHER,
Clerk

/s/ By: ROBERT A. BONNER
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

Filed Sep 17 1979

No. 78-1896

The Motor and Equipment Manufacturers Association, Inc., *Petitioner*

v.

Environmental Protection Agency and Douglas Costle, Administrator, Environmental Protection Agency, *Respondents*

State of California, *et al. intervenors*

And Consolidated Case Nos. 78-1901, 78-1931, 78-1943, and 78-1944

BEFORE: Wright, Chief Judge; MacKinnon and Robb, Circuit Judges

ORDER

Upon consideration of petitioners' (Motor and Equipment Manufacturers Association, Inc., *et al.*) petition for rehearing, it is

ORDERED, by the Court, that petitioners' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER

Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

Filed Sep 17 1979

No. 78-1896

The Motor and Equipment Manufacturers Association, Inc., *Petitioner*

v.

Environmental Protection Agency and Douglas Costle, Administrator, Environmental Protection Agency, *Respondents*

State of California, *et al., intervenors*

And Consolidated Case Nos. 78-1901, 78-1931, 78-1943, and 78-1944

BEFORE: Wright, Chief Judge; McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, Wilkey, and Wald, Circuit Judges

ORDER

The suggestion for rehearing *en banc,* filed by petitioners (Motor and Equipment Manufacturers, Association, Inc., et al.) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that petitioners' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER

Clerk

Circuit Judge McGowan did not participate in the foregoing order.

SUPREME COURT OF THE UNITED STATES

No. A-478

GENERAL MOTORS CORPORATION, ET AL., *Petitioners,*

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 14, 1980.

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 14th
day of December, 1979

CALIFORNIA STATE MOTOR VEHICLE POLLUTION CONTROL STANDARDS

Waiver of Federal Preemption

I. INTRODUCTION

By this decision, issued under section 209(b) of the Clean Air Act, as amended (hereinafter "the Act"),[1] I am granting the State of California a waiver of Federal preemption to enforce its limitations on allowable maintenance for 1980 and subsequent model year gasoline-powered passenger cars and for 1981 and subsequent model year gasoline-powered light duty trucks and medium duty vehicles.[2]

Under section 209(b)(1) of the act, when California requests a waiver of Federal preemption as to accompanying enforcement procedures which relate to standards for which a waiver has already been granted and is still in effect, I must grant the requested waiver unless I find that (1) the procedures may cause the California standards, in the aggregate, to be less protective of public health and welfare than the applicable Federal standards or (2) the California standards and accompanying enforcement procedures are not consistent with section 202(a) of the act. With regard to the first finding, if the public record of the proceedings before me contain plausible evidence that the California enforcement procedures may cause the California standards, in the aggregate, to be less protective than the corresponding Federal standards, then I must deny the waiver if: (1) California did not make a positive determination as to the protectiveness of the standards when coupled with the new enforcement procedures or (2) California did make such a determination, and the record contains clear and compelling evi-

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[1] 42 U.S.C. § 7543(b)(1977).

[2] Paragraphs 3e, 3f, 3g and 3h, "California Exhaust Emission Standards and Test Procedures for 1980 and Subsequent Model Passenger Cars, Light Duty Trucks and Medium Duty Vehicles," incorporated by reference in Title 13, Cal. Admin. Code § 1960(b), as amended September 30, 1977 [hereinafter "1980 Test Procedures ¶ _____"]; 13 Cal. Admin. Code § 1960(c) (May 26, 1977).

dence that its determination is arbitrary and capricious.[3] With regard to the second finding, State enforcement procedures are deemed not to be consistent with section 202(a) if there is inadequate lead time to permit the development of the technology necessary to implement the new procedures, giving appropriate consideration to the cost of compliance within that time frame, or if the Federal and California test procedures impose inconsistent certification requirements.

I cannot make the findings required for a denial of the waiver under section 209(b)(1) with respect to California's limitations on allowable maintenance for aforementioned vehicle classes.

II. Background

On May 26, 1977, the California Air Resources Board (CARB) adopted provisions limiting the scheduled maintenance, to be performed during certification, on the engine, emission control system and fuel system of durability vehicles.[4] It also adopted provisions requiring approval by the Executive Officer of in-use maintenance instructions. Manufacturers cannot recommend any emissions control related maintenance other than that performed during certification.[5] Exceptions, also subject to CARB approval, were provided for maintenance to vehicles operated under extreme conditions and for inspections necessary to assure safe operations of the vehicle in use.[6] Compliance with the certification and the maintenance instruction limitations is a prerequisite to certification. Accordingly, all of the allowable maintenance regulations are accompanying enforcement procedures subject to review under the criteria set forth in the introduction.

On June 9, 1977, California requested a waiver of Federal preemption for all of the foregoing limitations on allowable

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[3] 43 FR 9344, 9345, 9346 (Mar. 7, 1978).

[4] See 1980 Test Procedures ¶ 3f.

[5] 1980 Test Procedures ¶ 3e, 3g and 3h; 13 Cal. Admin. Code § 1960(c)(May 26, 1977).

[6] 1980 Test Procedures ¶ 3g(1).

maintenance.[7] Pursuant to a notice published in the Federal Register, a public hearing was held in San Francisco, Calif. on August 3-4, 1977.[8]

The Clean Air Act Amendments of 1977 were enacted on August 7, 1977.[9] EPA held a public hearing on October 13, 1977, to consider the effect of the amendments on this and all other pending waiver requests.[10]

III. Discussion

Public Health and Welfare. Certification procedures like the California limitations on allowable maintenance are "accompanying enforcement procedures" under section 209(b)(1) of the act.[11] The criteria for my review of the public health and welfare issue as it pertains to accompanying enforcement procedures have been set forth in the introduction.

California's 1980 and subsequent model year passenger car and 1981 and subsequent model year light duty truck and medium duty vehicle exhaust emission standards have received waivers of Federal preemption.[12] The public record does not contain plausible evidence that the restrictions on allowable maintenance cause the California standards to be less protective, in the aggregate, than the applicable Federal standards.

Furthermore, California has determined that its underlying standards as affected by the allowable maintenance limitations

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[7] Letter from Mr. William H. Lewis, Jr., executive officer, California Air Resources Board (CARB), to Douglas Costle, Administrator, Environmental Protection Agency (EPA), (June 9, 1977).

[8] 42 FR 36009 (July 13, 1977).

[9] Pub. L. 95-95, 91 Stat. 685 (Aug. 7, 1977).

[10] 42 FR 45942 (Sept. 13, 1977).

[11] 42 FR 3192, 3194 (Jan. 17, 1977).

[12] *See* 43 FR 25729 (June 14, 1978), pertaining to 1980 and subsequent model year passenger cars; 43 FR 1829 (Jan. 12, 1978), pertaining to 1981-82 light duty trucks and medium duty vehicles; 43 FR 15490 (Apr. 13, 1978), pertaining to 1983 and subsequent model year light duty trucks and medium duty vehicles.

are at least as protective of public health and welfare as the applicable Federal standards.[13] The public record does not contain clear and compelling evidence that this *determination* was arbitrary and capricious. As discussed later, the record contains assertions that *the restrictions themselves* are arbitrary and capricious or were adopted in an arbitrary and capricious manner. But, these contentions do not address the narrow determination to be reviewed herein. Accordingly, I find no basis for denying the waiver on this issue.

Consistency of Procedures. If I find that the California certification procedures conflict with the corresponding Federal procedures so as to make manufacturers unable to meet Federal and California requirements with the same test vehicle, I must deny the waiver unless the conflicts are resolved through administrative action. Because the California limitations on maintenance during certification are more restrictive than the corresponding Federal procedures,[14] and because the manufacturers presented no arguments on this issue, I cannot find a conflict between the respective certification procedures.[15]

Technology and Lead Time. I also must deny a California waiver request if I find inadequate lead time remaining to permit the development and application of the requisite technology. For the purposes of this discussion, I distinguish at times between the certification and in-use instruction limitations. However, because the in-use instruction limitations relate to the manufacturer's ability to produce motor vehicles which will conform to the standards throughout their useful life, their

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[13] State of California Air Resources Board, Resolution 77-48 at 4 (Sept. 30, 1977).

[14] *Compare* 40 C.F.R. § 86.078-25 and 1980 Test Procedures ¶ 3f. Since the Federal regulations specify the maximum frequency for performing various maintenance items, any less frequent intervals would not conflict with these regulations.

[15] Objections regarding possible conflicts between California's and Federal maintenance instruction limitations which do not present conflicting methods of obtaining certification, are discussed hereinafter.

technological feasibility along with that of the certification limitations is relevant to my decision.

With regard to certification maintenance limitations, Chrysler found them technologically feasible.[16] Ford also could comply with the limitations as they related to certification.[17] Ford and Chrysler did qualify their assessments by stating that they applied only to certification, and not to in-use or recommended maintenance.[18] AMC, although it could not say the limitations were technologically feasible, could not state that they were technologically infeasible.[19]

General Motors was the one major American manufacturer to argue that both the certification and in-use limitations were not technologically feasible within the remaining lead time.[20] General Motors, and others, pointed to the oxygen sensor as one essential component in future emission control systems having relatively unknown durability characteristics.[21] Some

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[16] Transcript of public hearing on California waiver request 231-232 (Aug. 3-4, 1977) [Hereinafter "August Tr."].

[17] August Tr. 130. Prior to the public hearing on Aug. 3-4, 1977, California banned the use of the fuel additive MMT in certification fuel. *See* letter from G. C. Hass, CARB, to all motor vehicle manufacturers (July 8, 1977). This eliminated the grounds for Ford's objections to the certification limitations.

[18] *See* notes 16, 17, *supra*.

[19] August Tr. 237.

[20] August Tr. 154, 161; General Motors statement to the CARB on proposed changes to allowable maintenance practices 8-10 (May 26, 1977); letter from Mr. T. M. Fisher, director, Automotive Emission Control, General Motors Corp., to Mr. Benjamin R. Jackson, director, Mobile Source Enforcement Division (MSED), EPA 2-3 (Aug. 26, 1977) [hereinafter GM Aug. 26, 1977, letter].

[21] August Tr. 187-188; Toyota comments before the EPA waiver hearing on the California exhaust emission standard for 1982 and subsequent model light and medium-duty vehicles, attachment I at 2 (Aug. 3-4, 1977); letter from Mr. Thomas C. Austin, deputy executive officer, CARB to Mr. Benjamin R. Jackson, director, MSED, EPA, attachment I at 4 (Aug. 31, 1977).

evidence in the record tended to support this position.[22] However, indications by Ford[23] and information provided by my staff regarding recent technological advancements suggest otherwise.[24] Based on the record before me, I cannot find that there is inadequate lead time in which to develop and apply the requisite technology.

Several manufacturers contended that the allowable maintenance limitations will inhibit the development and implementation of new emissions control technology.[25] The lack of actual examples, which would constitute evidence of this problem, make this argument speculative. Furthermore, the rapid technological advancements with regard to oxygen sensors, mentioned above, are strong evidence that manufacturers can design both new and durable emissions control components while meeting California's limited maintenance requirements.

The remaining objections, regarding specific maintenance items, pertain mostly to the in-use limitations. Many manufacturers argued that to assure proper functioning, drive belts required a "check and replace if necessary" maintenance instruction more frequently than every 30,000 miles.[26] AMC presented the only data supporting this position. That data consisted of test results showing a significant decrease in belt tension after initial operation.[27] However, subsequent evidence indicated that

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[22] *Id.;* State of California Air Resources Board, staff Report No. 77-12-1, at 13 (May 26, 1977).

[23] August Tr. 140.

[24] Memorandum from James McNab III, to file (Mar. 17, 1978).

[25] August Tr. 140-141, 146, 150-151, 188, 236, 237, 254. GM Aug. 26, 1977, letter 4. Transcript of public hearing on California waiver requests 175 (Oct. 13, 1977) [hereinafter "October Tr."].

[26] August Tr. 117, 161, 167-168, 228, 233, 235, 238; GM Aug. 26, 1977, letter 6-7; Toyota comments, note 21, *supra,* attachment I at 1; Volkswagen and Audi's reply to CARB proposal for changes to regulations regarding allowable maintenance during new vehicle certification of light-duty and medium-duty vehicles 2 (Apr. 28, 1977).

[27] August Tr. 235.

belt tension stabilizes after initial break-in, and the addition of a pre-sale check would reduce this problem.[28] Similar objections concerning "inspect and replace if necessary" maintenance items were made by several manufacturers with respect to air and fuel filters[29] and by General Motors with respect to emissions related hoses and tubings.[30] Provisions, discussed above, in the California regulations allow a manufacturer to recommend additional maintenance for extreme driving conditions or for safety reasons. In addition, General Motors in making its objection apparently did not give full consideration to all of the technological alternatives available at the time of the public hearing.[31] For these reasons, there is insufficient evidence to support a finding based on the foregoing arguments that the allowable maintenance regulations are technologically infeasible within the remaining lead time.

Subaru contended that small, highly loaded engines, and particularly those operating on leaded fuels, cannot run for 30,000 miles between spark plug changes.[32] Another argument, made by General Motors, centered on the need for more frequent adjustments to mechanical ignition timing systems, which GM intends to continue utilizing.[33] Again, I do not find these arguments to be persuasive due to the lack of supporting evidence.

Lastly, General Motors argued that the CARB had failed to demonstrate that the regulations are technologically feas-

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[28] August Tr. 237-238.

[29] August Tr. 228; GM Aug. 26, 1977; letter 5-6; Toyota comments, note 20, *supra,* attachment I at 2.

[30] August Tr. 169-174; GM Aug. 26, 1977, letter 6-7.

[31] Ronald E. Kruse, "Analysis of the Technical Feasibility of the California Allowable Maintenance Regulations"—waiver hearing, Aug. 3—4, attachment II (November 1977) [hereinafter "EPA Analysis"].

[32] August Tr. 253.

[33] August Tr. 183-184; GM Aug. 26, 1977, letter 4.

ible.[34] This contention, however, ignores the fact that the manufacturer has the burden of demonstrating the existence of grounds upon which, under the criteria enumerated in section 209(b), I must deny a waiver request.[35]

Based on the foregoing discussion and the analysis of my staff,[36] I cannot find that there is inadequate lead time remaining to permit the development and application of the requisite technology.

Cost of Compliance. The CARB estimated that the regulations would reduce maintenance costs by an amount sufficient to offset any increase in retail costs, resulting in a net cost benefit.[37] The manufacturers did not challenge this conclusion. Several trade associations, representing the aftermarket parts and service industry, argued that the regulations would not result in a cost benefit.[38] These arguments are not supported by data refuting the CARB's conclusion. In addition, a finding that the regulations are cost effective is not required. Accordingly, I cannot find that the cost of complying with California's restrictions on allowable maintenance presents sufficient grounds for denying the waiver request.

Objections to Granting the Waiver. Ford, General Motors, AMC, and the Motor and Equipment Manufacturers Association all argued that California does not need restrictions on allowable maintenance as they, in the eyes of the interested

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[34] August Tr. 154; October Tr. 174.

[35] 40 FR 30311, 30314 (July 18, 1975).

[36] EPA analysis 3-5.

[37] Staff Report 77-12-1, note 22, supra, 28-30, 32-33; August Tr. 29.

[38] August Tr. 89-91, 194-197; "Comments of Automotive Service Industry Association (ASIA) in Opposition to Waiver Request of the California Air Resources Board Regarding Allowable Maintenance" 3 (July 25, 1977); "Supplemental Comments of ASIA Relative to Waiver Requests of the California Air Resources Board Regarding Allowable Maintenance" 3 (Sept. 23, 1977); Letter from Mr. Frank Engler, Chairman, Trust for Automotive Political Education, to Mr. Benjamin R. Jackson, Director, MSED, EPA, 1 (July 27, 1977).

parties, will contribute to rather than alleviate California's air pollution problems.[39] In prior waiver decisions, I have addressed my scope of review insofar as "accompanying enforcement procedures" are concerned.[40] Under section 209(b) the question of need is only applicable to a waiver request concerning standards.

As mentioned above, several interested parties argued in various ways that the California regulations are arbitrary and capricious or were adopted in an arbitrary and capricious manner.[41] These contentions are all beyond the narrow scope of re-

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[39] August Tr. 91-92, 133, 154, 190-191, 237; GM Aug. 26, 1977 Letter 2; Statement of Ford Motor Co., "Clean Air Act Amendments of 1977—Limitations on Maintenance Adopted by California" 4 (Oct. 13, 1977) [hereinafter "Ford's October Statement"]; Letter from T.M. Fisher, Director, Automotive Emission Control, General Motors, to Mr. B. R. Jackson, [Director], MSED, EPA, (Feb. 16, 1978); "General Motors Analysis of the Reports Used by the California Air Resources Board to Support the Restricted Maintenance Regulation" 1-8, 15 (Feb. 1978). The CARB Staff Reports and other submissions to the public record disagreed with this contention. It contended that given vehicle owners' maintenance practices, improved designs which would result from the allowable maintenance limitations would result in emissions reductions. See State of California Air Resources Board, Staff Report 77-9-2, at 1, 3-12, 19-28 (Apr. 28, 1977); Staff Report 77-12-1, note 22, supra, 1, 3-12, 19-28; CARB Letter of Aug. 31, 1977, note 21, supra, Attachment I at 13; Letter from Mr. Thomas C. Austin, Deputy Executive Officer, CARB, to Mr. Benjamin R. Jackson, MSED, EPA, 1-4 (Mar. 20, 1978).

[40] 43 FR 9344, 9345 (Mar. 7, 1978).

[41] Motor Vehicle Manufacturers Association of the United States, Inc., "A Memorandum to the California Air Resources Board Regarding Proposed Maintenance Requirements" 1-4, 7-8 (Jan. 31, 1977) [hereinafter "MVMA Memo"]; Memorandum from John P. Eppel and Helen O. Petrauskas, Ford Motor Co., to B. R. Jackson, Presiding Officer, EPA, 24-33 (Sept. 9, 1977) [hereinafter "Ford Sept. 9, 1977 Memo"]; GM Aug. 26, 1977 letter 4, 8; October Tr. 176-179, 183, 185-189, 191; Supplemental Comments of ASIA, note 38, supra, 3; Ford's October Statement 2; Letter from Michael W. Grice, Esq., Chrysler Corp., to Mr. Benjamin R. Jackson, Director, MSED, EPA, 2 (Oct. 28, 1977). General Motors Analysis, note 39, supra, 15; Letter from T. M. Fisher to Mr. Benjamin R. Jackson of Feb. 16, 1978, note 39, supra.

view granted to me by section 209(b)(1)(A) of the act and its legislative history.[42] As prior waiver decisions have held, section 209(b) does not give me the latitude to review procedures at the State level, and the EPA hearing is not the proper forum in which to raise these objections.[43] Similarly, objections pertaining to the wisdom of California's judgment on various public policy matters[44] are beyond my scope of review.[45]

The most often expressed objection to these regulations centered on potential conflicts between the California limitations on what maintenance instructions may be provided to owners and section 207(c)(3)(A) of the act.[46] This section of the act provides that the manufacturer shall provide maintenance instructions which correspond to regulations promulgated by the Administrator. Interested parties argued that this provision entirely preserves this area for Federal regulation and that California's maintenance instructions are not entitled to a waiver.[47]

I cannot accept this contention. A State's right to prescribe limitations on allowable maintenance is not preempted by the existence of section 207(c)(3)(A). The only applicable preemption provision in the act is section 209(a); it is what prevents States from acting on their own.[48] Because the California maintenance instruction requirements constitute a condition precedent to the initial retail sale of a new motor vehicle in California, they fall within the purview of section 209(a) and are subject to preemption. California has received a waiver for the underlying standards, and I have found that I cannot deny the waiver request for these limitations under the criteria specified in section 209(b)(1). The maintenance instruction limitations are, therefore, entitled to a waiver and are no longer subject to the preemption of section 209(a).

Interested parties further contended that they cannot provide maintenance instructions which are consistent with both section 207(c)(3)(A) and the California limitations.[49] The initial arguments, contending that a manufacturer has the right to determine what maintenance is reasonable and necessary, have been mooted by the Clean Air Act Amendments of 1977.[50] Until I promulgate regulations regarding written maintenance instructions, California's limitations clearly do not conflict with any Federal requirements. I will give appropriate consideration to California's regulatory scheme in any regulations I promulgate.

Another major objection, raised primarily by Ford and General Motors, challenged the maintenance limitations on several constitutional grounds.[51] Despite contentions to the con-

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[42] 42 U.S.C. 7543(b)(1)(A) (1977); H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301-302 (1977).

[43] 42 FR 44209, 44212 (Oct. 7, 1976).

[44] Notes 38 and 39, supra; August Tr. 86-113, 193-209.

[45] 42 FR 44209, 44210 (Oct. 7, 1976).

[46] 42 U.S.C. § 7541(c)(3)(A) (1977).

[47] Comments of ASIA, note 38, supra, 3; MVMA Memo 6-7; MVMA Response to the Staff Memorandum 6 (Jan. 31, 1977); August Tr. 88-89, 123, 214-215, 219, 224-225, 254; October Tr. 137-139; Ford's October Statement 5-6.

[48] Section 116 of the act identifies sections that preempt certain State actions; the remaining powers are left to the States. 42 U.S.C. § 7416 (1977); CARB, "Memorandum of Legal Points" 10 (Oct. 13, 1977).

[49] Comments of ASIA, note 38, supra, 3; Letter from MVMA, note 47, supra 2; MVMA Memo 4-6; MVMA Response to the Staff Memorandum 5-6 (Jan. 31, 1977); Supplemental Comments of ASIA, note 38, supra, 1-3; August Tr. 87-88, 115, 124-125, 156-158, 214, 221; Statement of Ford Motor Co.—Hearing of the Environmental Protection Agency to Consider California's Request for a Waiver with Respect to Emission Control Related Maintenance 4-5 (Aug. 3, 1977) [hereinafter "Ford's August Statement"]; General Motors Legal Comments to the CARB Regarding Proposed Regulations to Limit the Amount of Maintenance Which Vehicle Manufacturers may Perform during Certification and Recommend to their Customers 3-5 (May 26, 1977).

[50] See 42 FR 45942, 45943 (Sept. 13, 1977) wherein EPA determined that the Clean Air Act Amendments of 1977 applied to all pending waiver requests including this one.

[51] "Ford Motor Co. Suggested Agenda for Meeting with CARB Legal Counsel Regarding Proposed Limitation on Regularly Schedul-

trary, these arguments are beyond the scope of my review, and the waiver hearing is not the proper forum in which to raise them.[52] Accordingly, I am not legally empowered to make a determination regarding these contentions.

IV. Findings and Decision

Having given due consideration to the public record, I find that I cannot make the findings required for a denial of a waiver under section 209(b)(1) of the act. Therefore, I hereby waive application of section 209(a) of the act to the State of California with respect to: (1) paragraphs 3e, 3f, 3g and 3h of the "California Exhaust Emission Standards and Test Procedures for 1980 and Subsequent Model [Year] Passenger Cars, Light Duty Trucks and Medium Duty Vehicles," as amended September 30, 1977 and incorporated by reference in Title 13, California Administrative Code, § 1960(b) and (2) section 1960(c) of Title 13 of the California Administrative Code, adopted May 26, 1977. This waiver covers the limitation on allowable maintenance applicable to 1980 and subsequent model year gasoline-powered passenger cars and 1981 and subsequent model year gasoline-powered light duty trucks and medium duty vehicles.

My decision to grant the waiver will affect not only persons in California but also the manufacturers located outside the State who must comply with California's standards in order to produce motor vehicles for sale in California. For this reason I hereby determine and find that this decision is of nationwide scope and effect.

A copy of the above standards and procedures, as well as the record of the hearing and those documents used in arriving at this decision, is available for public inspection during normal working hours (8 a.m. to 4:30 p.m.) at the U.S. Environmental

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ed Maintenance" 3 submitted July 25, 1977; MVMA Response to the Staff Memorandum 12-13 (Jan. 31, 1977); August Tr. 127-129, 158-159, 230; Ford's August Statement 7-10; General Motors Legal Comments (May 26, 1977), note 49, supra, 7, 9-13; Ford's October Statement 6-8.

[52] 42 FR 2337, 2339 (Jan. 11, 1977).

Protection Agency, Public Information Reference Unit Room 2922 (EPA Library), 401 M Street SW., Washington, D.C. 20460. Copies of the standards and test procedures are also available upon request from the California Air Resources Board, 1102 Q Street, Sacramento, Calif. 95812.

Dated: July 17, 1978.

Douglas M. Costle,
Administrator

[FR Doc. 78-20518 Filed 7-24-78; 8:45 am]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

Office of Enforcement

Mr. Thomas C. Austin
California Air Resources Board
P.O. Box 2815
1102 Q Street
Sacramento, California 95812

Dear Mr. Austin:

Your letter of February 27, 1979, notified this Agency that California's allowable maintenance regulations had been amended on February 9, 1979. You indicated your opinion that these amendments fall within the scope of the Administrator's July 17, 1978, waiver decision published on July 25, 1978 at 43 Fed. Reg. 32182 and requested our concurrence with this determination.

The Administrator's July 17 decision granted California a waiver of Federal preemption to enforce its provisions restricting maintenance which can be performed by manufacturers during certification and maintenance instructions for in-use vehicles. The February 9 amendments affect only the in-use maintenance instruction requirements, removing restrictions on those instructions which a manufacturer can recommend. Instructions pertaining to required maintenance remain subject to the same requirements previously imposed. Under the February 9 amendments, instructions pertaining to recommended maintenance fall into a broader category of instructions which are free from restriction except for compliance with Federal requirements.

Insofar as the February 9 amendments retain the restrictions on instructions pertaining to required maintenance, we have determined that they fall within the scope of the waiver granted on July 17, 1978, which is currently in effect. The amendments that removed restrictions on recommended maintenance constitute minor changes which do not affect the tech-

nological feasibility of California's requirements, present no new issues affecting the Administrator's prior determination, and likewise fall within the scope of the previously granted waiver. Therefore, no new waiver is needed.

If California takes subsequent action imposing new requirements on the manufacturers (including restrictions on recommended maintenance instructions) that raise issues regarding technological feasibility, we would be required to consider such amendments in a full waiver proceeding.

We anticipate publishing notice of this determination in the *Federal Register* in the near future.

Sincerely yours,
/s/ MARVIN B. DURNING
Assistant Administrator
for Enforcement

FIRST AMENDMENT TO UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 207, 42 U.S.C. § 7541. COMPLIANCE BY VEHICLES AND ENGINES IN ACTUAL USE. (a)(1) Effective with respect to vehicles and engines manufactured in model years beginning more than 60 days after the date of the enactment of the Clean Air Amendments of 1970, the manufacturer of each new motor vehicle and new motor vehicle engine shall warrant to the ultimate purchaser and each subsequent purchaser that such vehicle or engine is (A) designed, built, and equipped so as to conform at the time of sale with applicable regulations under section 202, and (B) free from defects in materials and workmanship which cause such vehicle or engine to fail to conform with applicable regulations for its useful life (as determined under section 202(d)).

(2) In the case of a motor vehicle part or motor vehicle engine part, the manufacturer or rebuilder of such part may certify that use of such part will not result in a failure of the vehicle or engine to comply with emission standards promulgated under section 202. Such certification shall be made only under such regulations as may be promulgated by the Administrator to carry out the purposes of subsection (b). The Administrator

shall promulgate such regulations no later than two years following the date of the enactment of this paragraph.

(3) The cost of any part, device, or component of any light-duty vehicle that is designed for emission control and which in the instructions issued pursuant to subsection (c)(3) of this section is scheduled for replacement during the useful life of the vehicle in order to maintain compliance with regulations under section 202 of this Act, the failure of which shall not interfere with the normal performance of the vehicle, and the expected retail price of which, including installation costs, is greater than 2 percent of the suggested retail price of such vehicle, shall be borne or reimbursed at the time of replacement by the vehicle manufacturer and such replacement shall be provided without cost to the ultimate purchaser, subsequent purchaser, or dealer. The term "designed for emission control" as used in the preceding sentence means a catalytic converter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions (not including those vehicle components which were in general use prior to model year 1968 and the primary function of which is not related to emission control).

(b) If the Administrator determines that (i) there are available testing methods and procedures to ascertain whether, when in actual use throughout its useful life (as determined under section 202(d)), each vehicle and engine to which regulations under section 202 apply complies with the emission standards of such regulations, (ii) such methods and procedures are in accordance with good engineering practices, and (iii) such methods and procedures are reasonably capable of being correlated with tests conducted under section 206(a)(1), then—

(1) he shall establish such methods and procedures by regulation, and

(2) at such time as he determines that inspection facilities or equipment are available for purposes of carrying out testing methods and procedures established under paragraph (1), he shall prescribe regulations which shall require

manufacturers to warrant the emission control device or system of each new motor vehicle or new motor vehicle engine to which a regulation under section 202 applies and which is manufactured in a model year beginning after the Administrator first prescribes warranty regulations under this paragraph. The warranty under such regulations shall run to the ultimate purchaser and each subsequent purchaser and shall provide that if—

(A) the vehicle or engine is maintained and operated in accordance with instructions under subsection (c)(3),

(B) it fails to conform at any time during its useful life (as determined under section 202(d)) to the regulations prescribed under section 202, and

(C) such nonconformity results in the ultimate purchaser (or any subsequent purchaser) of such vehicle or engine having to bear any penalty or other sanction (including the denial of the right to use such vehicle or engine) under State or Federal law,

then such manufacturer shall remedy such nonconformity under such warranty with the cost thereof to be borne by the manufacturer. No such warranty shall be invalid on the basis of any part used in the maintenance or repair of a vehicle or engine if such part was certified as provided under subsection (a)(2). For purposes of the warranty under this subsection, for the period after twenty-four months or twenty-four thousand miles (whichever first occurs) the term "emission control device or system" means a catalytic converter, thermal reactor, or other component installed on or in a vehicle for the sole or primary purpose of reducing vehicle emissions. Such terms shall not include those vehicle components which were in general use prior to model year 1968.

(c) Effective with respect to vehicles and engines manufactured during model years beginning more than 60 days after the date of enactment of the Clean Air Amendments of 1970—

(1) If the Administrator determines that a substantial number of any class or category of vehicles or engines, although properly maintained and used, do not conform to the regulations prescribed under section 202, when in actual use throughout their useful life (as determined under section 202(d)), he shall immediately notify the manufacturer thereof of such nonconformity, and he shall require the manufacturer to submit a plan for remedying the nonconformity of the vehicles or engines with respect to which such notification is given. The plan shall provide that the nonconformity of any such vehicles or engines which are properly used and maintained will be remedied at the expense of the manufacturer. If the manufacturer disagrees with such determination of nonconformity and so advises the Administrator, the Administrator shall afford the manufacturer and other interested persons an opportunity to present their views and evidence in support thereof at a public hearing. Unless, as a result of such hearing the Administrator withdraws such determination of nonconformity, he shall, within 60 days after the completion of such hearing, order the manufacturer to provide prompt notification of such nonconformity in accordance with paragraph (2).

(2) Any notification required by paragraph (1) with respect to any class or category of vehicles or engines shall be given to dealers, ultimate purchasers, and subsequent purchasers (if known) in such manner and containing such information as the Administrator may by regulations require.

(3)(A) The manufacturer shall furnish with each new motor vehicle or motor vehicle engine written instructions for the proper maintenance and use of the vehicle or engine by the ultimate purchaser and such instructions shall correspond to regulations which the Administrator shall promulgate. The manufacturer shall provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and systems may be performed by any automotive repair establishment or individual using any automotive part which has been certified as provided in subsection (a)(2).

(B) The instruction under subparagraph (A) of this paragraph shall not include any condition on the ultimate purchaser's using, in connection with such vehicle or engine, any component or service (other than a component or service provided without charge under the terms of the purchase agreement) which is identified by brand, trade, or corporate name; or directly or indirectly distinguishing between service performed by the franchised dealers of such manufacturer or any other service establishments with which such manufacturer has a commercial relationship, and service performed by independent automotive repair facilities with which such manufacturer has no commercial relationship; except that the prohibition of this subsection may be waived by the Administrator if—

(i) the manufacturer satisfies the Administrator that the vehicle or engine will function properly only if the component or service so identified is used in connection with such vehicle or engine, and

(ii) the Administrator finds that such a waiver is in the public interest.

(C) In addition, the manufacturer shall indicate by means of a label or tag permanently affixed to such vehicle or engine that such vehicle or engine is covered by a certificate of conformity issued for the purpose of assuring achievement of emissions standards prescribed under section 202 of this Act. Such label or tag shall contain such other information relating to control of motor vehicle emissions as the Administrator shall prescribe by regulation.

(d) Any cost obligation of any dealer incurred as a result of any requirement imposed by subsection (a), (b), or (c) shall be borne by the manufacturer. The transfer of any such cost obligation from a manufacturer to any dealer through franchise or other agreement is prohibited.

(e) If a manufacturer includes in any advertisement a statement respecting the cost or value of emission control devices or systems, such manufacturer shall set forth in such statement the

cost or value attributed to such devices or systems by the Secretary of Labor (through the Bureau of Labor Statistics). The Secretary of Labor, and his representatives, shall have the same access for this purpose to the books, documents, papers, and records of a manufacturer as the Comptroller General has to those of a recipient of assistance for purposes of section 311.

(f) Any inspection of a motor vehicle or a motor vehicle engine for purposes of subsection (c)(1), after its sale to the ultimate purchaser, shall be made only if the owner of such vehicle or engine voluntarily permits such inspection to be made, except as may be provided by any State or local inspection program.

(g) For the purposes of this section, the owner of any motor vehicle or motor vehicle engine warranted under this section is responsible in the proper maintenance of such vehicle or engine to replace and to maintain, at his expense at any service establishment or facility of his choosing, such items as spark plugs, points, condensers, and any other part, item, or device related to emission control (but not designed for emission control under the terms of the last three sentences of section 207(a)(1), unless such part, item, or device is covered by any warranty not mandated by this Act.

(h)(1) Upon the sale of each new light-duty motor vehicle by a dealer, the dealer shall furnish to the purchaser a certificate that such motor vehicle conforms to the applicable regulations under section 202, including notice of the purchaser's rights under paragraph (2).

(2) If at any time during the period for which the warranty applies under subsection (b), a motor vehicle fails to conform to the applicable regulations under section 202 as determined under subsection (b) of this section such nonconformity shall be remedied by the manufacturer at the cost of the manufacturer pursuant to such warranty as provided in section 207(b)(2) (without regard to subparagraph (C) thereof).

(3) Nothing in section 209(a) shall be construed to prohibit a State from testing, or requiring testing of, a motor vehicle after the date of sale of such vehicle to the ultimate purchaser

(except that no new motor vehicle manufacturer or dealer may be required to conduct testing under this paragraph).

* * *

SEC. 209, 42 U.S.C. § 7543. STATE STANDARDS. (a) No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b)(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards. No such waiver shall be granted if the Administrator finds that—

(A) the determination of the State is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 202(a) of this part.

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) in the case of any new motor vehicle or new motor vehicle engine to which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this title.

(c) Whenever a regulation with respect to any motor vehicle part or motor vehicle engine part is in effect under section 207(a)(2), no State or political subdivision thereof shall adopt or attempt to enforce any standard or any requirement of certification, inspection, or approval which relates to motor vehicle emissions and is applicable to the same aspect of such part. The preceding sentence shall not apply in the case of a State with respect to which a waiver is in effect under subsection (b).

(d) Nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

CALIFORNIA EXHAUST EMISSION STANDARDS AND TEST PROCEDURES FOR 1980 MODEL PASSENGER CARS, LIGHT-DUTY TRUCKS, AND MEDIUM-DUTY VEHICLES*

Adopted: May 24, 1978

The provisions of Subparts A and B, Part 86, Title 40, Code of Federal Regulations, as they existed on April 15, 1978, are hereby adopted as the California Exhaust Emission Standards and Test Procedures for 1980 Model Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles, with the following exceptions and additions:

[3]f. In paragraph 86.078-25 (Maintenance):

1. Amend subparagraph (a)(1) to read as follows:

(1) Scheduled maintenance on the engine, emission control system and fuel system of durability vehicles shall, unless otherwise provided pursuant to subparagraph (a)(5)(iii), be restricted as set forth in the following provisions.

(i)(A) for gasoline-fueled vehicles, maintenance shall be restricted to the inspection, replacement, cleaning, adjustment and/or service of the following items at intervals no more frequent than indicated:

(1) Drive belts on engine accessories (tension adjustment only); (30,000 miles).

(2) Valve lash (15,000 miles).

(3) Spark plugs (30,000 miles).

(4) Air filter (30,000 miles).

* These procedures have been extracted from the "California Exhaust Emission Standards and Test Procedures for 1980 and Subsequent Model Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles," adopted November 23, 1976, as last amended April 10, 1978.

(5) Exhaust gas sensor (30,000 miles): Provided, an audible and/or visible signal approved by the Executive Officer alerts the vehicle operator to the need for sensor maintenance.

(6) Choke (cleaning or lubrication only); (30,000 miles).

(7) In addition, adjustment of the engine idle speed (curb idle and fast idle), valve lash, and engine bolt torque may be performed once during the first 5,000 miles of scheduled driving, provided the manufacturer makes a satisfactory showing that the maintenance will be performed on vehicles in use.

(B) for diesel-powered vehicles, maintenance shall be restricted to the following items at intervals no more frequent than every 12,500 miles of scheduled driving, provided that no maintenance may be performed after 45,000 miles of scheduled driving:

(1) Adjust low idle speed.

(2) Adjust valve lash if required.

(3) Adjust injector timing.

(4) Adjust governor.

(5) Clean and service injector tips.

(6) Adjust drive belt tension on engine accessories.

(7) Check engine bolt torque and tighten as required.

(ii) Change of engine and transmission oil, and change or service of oil filter, fuel filter, and air filter, will be allowed at the mileage intervals specified in the manufacturer's maintenance instructions.

(iii) Maintenance shall be conducted in a manner consistent with service instructions and specifications provided by the manufacturer for use by customer service personnel.

2. Delete subparagraph (a)(3) (Service of exhaust gas recirculation system).

3. Delete subparagraph (a)(4) (Service of catalytic converter).

[3]g. In paragraph 86.078-38 (Maintenance instructions):

1. Amend subparagraph (a) to read:

(a) The manufacturer shall furnish or cause to be furnished to the purchaser of each new motor vehicle (or motor vehicle engine) subject to the standards prescribed in paragraphs 86.078-8 through 86.078-11 as applicable, written instructions for the maintenance and use of the vehicle (or engine) by the purchaser as may be reasonable and necessary to assure the proper functioning of emission control systems in normal use. Such instructions shall be consistent with and not require maintenance in excess of the restrictions imposed under subparagraph 86.078-25(a)(1), except that the instructions may, subject to approval by the Administrator, require additional maintenance for vehicles operated under extreme conditions. In addition, subject to approval by the Administrator, the instructions may specify inspections necessary to insure safe operation of the vehicle in use.

2. Amend subparagraph (c)(1) to read:

(1) Such instructions shall specify the performance of all scheduled maintenance performed by the manufacturer under subparagraph 86.078-25(a)(1).

3. Amend subparagraph (d) by adding a new subparagraph (3) to read:

(3) Such instructions shall specify the performance of all scheduled maintenance performed by the manufacturer under subparagraph 86.078-25(a)(1).

[3]h. Amend subparagraph 86.078-39(a) (Submission of maintenance instructions) to read:

(a) The manufacturer shall provide to the Administrator, no later than the time of the submission required by paragraph 86.078-23, a copy of the maintenance instructions which the manufacturer proposes to supply to the ultimate purchaser in accordance with subparagraph 86.078-38(a). The Administrator will review such instructions to determine whether they are reasonable and necessary to assure the proper functioning of the vehicle's (or engine's) emission control systems in normal use, and for consistency with the restrictions imposed under subparagraph 86.078-25(a)(1). The Administrator will notify the manufacturer of his determination whether such instructions are reasonable and necessary to assure the proper functioning of the emission control systems in normal use, and whether such instructions are consistent with the restrictions imposed under subparagraph 86.078-25(a)(1).

AMENDMENTS TO CALIFORNIA EXHAUST EMISSIONS STANDARDS AND TEST PROCEDURES FOR 1980 MODEL PASSENGER CARS, LIGHT DUTY TRUCKS, AND MEDIUM—DUTY VEHICLES

3.g. In paragraph 86.073-38 (Maintenance instructions):

1. Amend subparagraph (a) to read:

(a) The manufacturer shall furnish or cause to be furnished to the purchaser of each new motor vehicle (or motor vehicle engine) subject to the standards prescribed in paragraphs 86.078-8 through 86.078-11 as applicable, written instructions for the maintenance and use of the vehicle (or engine) by the purchaser as may be reasonable and necessary to assure the proper functioning of emission control systems in normal use. Such instructions shall be consistent with and not require maintenance in excess of the restrictions imposed under subparagraph 86.078-25(a)(1), except that the instructions may, subject to approval by the Administrator, require additional maintenance for vehicles operated under extreme conditions. In addition, subject to approval by the Administrator, the instructions may ~~specify~~ *require* inspections necessary to insure safe operation of the vehicle in use.

In addition to any maintenance which a manufacturer may require pursuant to the preceding paragraph, the instructions may also recommend such inspections, maintenance, and repair as may be reasonable and necessary for the proper functioning of the vehicle and its emission control systems. If the instructions recommend maintenance in addition to that which may be required pursuant to the preceding paragraph, they shall distinguish clearly between required and recommended maintenance.

2. Amend subparagraph (c)(1) to read:

(1) Such instructions shall specify the performance of all scheduled maintenance performed by the manufacturer under subparagraph 86.078-25(a)(1).

If the instructions specify recommended maintenance as well as required maintenance, they shall distinguish clearly between the two.

3. Amend subparagraph (d) by adding a new subparagraph (3) to read:

(3) Such instructions shall specify the performance of all scheduled maintenance performed by the manufacturer under subparagraph 86.078-25(a)(1).

If the instructions specify recommended maintenance as well as required maintenance, they shall distinguish clearly between the two.

3.h. Amend subparagraph 86.077-39(a) (Submission of maintenance instructions) to read:

(a) The manufacturer shall provide to the Administrator, no later than the time of the submission required by paragraph 86.078-23 a copy of the maintenance instructions which the manufacturer proposes to supply to the ultimate purchaser in accordance with subparagraph 86.078-38(a). The Administrator will review such instructions to determine whether they are *consistent with federal requirements*, ~~reasonable and necessary to assure the proper functioning of the vehicle's (or engine's) emission control systems in normal use, and for consisteney~~ and to determine whether the instructions for required maintenance are consistant with the restrictions imposed under subparagraph 86.078-25(a)(1). The Administrator will notify the manufacturer of his determinations. ~~whether such instructions are reasonable and necessary to assure the proper functioning of the emission control systems in normal use, and whether such instructions are consistent with the restrictions imposed under subparagraph 86.078-25(a)(1).~~

Supreme Court, U. S.
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No. 79-1262

In the Supreme Court of the United States

OCTOBER TERM, 1979

GENERAL MOTORS CORPORATION, ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Question presented	2
Statement	2
Argument	7
Conclusion	19

CITATIONS

Cases:

Adamo Wrecking Co. v. *United States*, 434 U.S. 275	10
Banzhaf v. *FCC*, 405 F.2d 1082, cert. denied, 396 U.S. 842	15
Bates v. *State Bar of Arizona*, 433 U.S. 350	17
Carvey v. *Population Services International*, 431 U.S. 678	17
Downen v. *Warner*, 481 F.2d 642	15
Eisen v. *Eastman*, 421 F.2d 560, cert. denied, 400 U.S. 841	15
Federal Maritime Comm'n v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238	14
Gulf State Utilities Co. v. *FPC*, 411 U.S. 747	14
Hanover Township Federation of Teachers v. *Hanover Community School Corp.*, 457 F.2d 456	16-17

Cases—Continued

	Page
International Brotherhood of Teamsters v. *Daniel*, 439 U.S. 551	17
Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85	17
Miami Herald Publishing Co. v. *Tornillo*, 418 U.S. 241	17
Midwest Video Corp. v. *FCC*, 571 F.2d 1025, aff'd, 440 U.S. 689	15
Oestereich v. *Selective Service Board*, 393 U.S. 233	14
Plano v. *Baker*, 504 F.2d 595	14
Public Utilities Comm'n of California v. *United States*, 355 U.S. 534	14
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367	18
SEC v. *Wall Street Transcript Corp.*, 422 F.2d 1371, cert. denied, 398 U.S. 958	14
Smith v. *Arkansas State Highway Employees*, 441 U.S. 463	16
Spiegel, Inc. v. *FTC*, 540 F.2d 287	15
Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60	18
Union Electric Company v. *EPA*, 427 U.S. 246	17-18
United States v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694	18
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748	15, 17

Constitution, statutes, and regulations:

United States Constitution, First Amendment	14, 15, 16

Constitution, statutes and regulations—Continued

	Page
Clean Air Act, 42 U.S.C. (Supp. I) 7401 *et seq.*	2
Section 177, 42 U.S.C. (Supp. I) 7507	8
Section 202, 42 U.S.C. (Supp. I) 7521	3
Section 202(a), 42 U.S.C. (Supp. I) 7521(a)	3, 11
Section 202(a)(2), 42 U.S.C. (Supp. I) 7521(a)(2)	11
Section 202(a)(4), 42 U.S.C. (Supp. I) 7521(a)(4)	13
Section 206, 42 U.S.C. (Supp. I) 7525	3
Section 207, 42 U.S.C. (Supp. I) 7541	5
Section 209(a), 42 U.S.C. (Supp. I) 7543(a)	3
Section 209(b), 42 U.S.C. (Supp. I) 7543(b)	2, 3, 8, 9, 10, 11, 19
Section 209(b)(1), 42 U.S.C. (Supp. I) 7543(b)(1)	6, 8, 11, 13
Section 209(b)(1)(B), 42 U.S.C. (Supp. I) 7543(b)(1)(B)	11
Section 307(b), 42 U.S.C. (Supp. I) 7607(b)	18
13 Cal. Admin. Code § 1960(b)	4
40 C.F.R. 86.078-23	4
40 C.F.R. 86.078-26	4
40 Fed. Reg. 30311, 30314 (1975)	10

Miscellaneous: Page

H.R. Rep. No. 90-728, 90th Cong., 1st Sess. (1967) 10
H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977) 3, 9, 10, 14, 18
S. Rep. No. 90-403, 90th Cong., 1st Sess. (1967) 10

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GENERAL MOTORS CORPORATION, ET AL., PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) has not yet been reported. The decision of the Administrator of the Environmental Protection Agency (Pet. App. 73a-85a) appears at 43 Fed. Reg. 32182 (1978). A subsequent modifying letter (Pet. App. 86a-87a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1979. A petition for rehearing was denied on September 17, 1979. The Chief Justice extended the time in which to file a petition for a writ of certiorari to and including February 14, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 209 of the Clean Air Act, 42 U.S.C. (Supp. I) 7543, is set forth at Pet. App. 94a-95a.

QUESTION PRESENTED

Whether the court of appeals correctly refused to set aside the Administrator's waiver of federal preemption, pursuant to Section 209(b) of the Clean Air Act, in respect of regulations adopted by the State of California that limit the amount of maintenance that a manufacturer can require of motor vehicle purchasers in the written instructions which accompany new vehicles sold in that State.

STATEMENT

1. Sections 101-216 of the Clean Air Act, 42 U.S.C. (Supp. I) 7401-7550, set forth a scheme for the regulation of emissions from new motor vehicles. Section 202 empowers the Administrator of the Environmental Protection Agency (EPA) to prescribe standards limiting the emission of

certain air pollutants from new motor vehicles. 42 U.S.C. (Supp. I) 7521. Section 206 concerns certification, a procedure in which the Administrator tests prototypes of new motor vehicles submitted by manufacturers to determine whether such vehicles conform with the standards prescribed under Section 202. 42 U.S.C. (Supp. I) 7525. If the tests show that the prototype conforms to the standards and related regulations the Administrator must issue a certificate of conformity to its manufacturer.

In order to relieve manufacturers of the burden of conforming to a multiplicity of emission standards established by different jurisdictions, Section 209(a) of the Act preempts states or local governments from adopting or enforcing any requirement relating to the control of emissions as a condition precedent to the initial retail sale, titling or registration of new motor vehicles or engines. 42 U.S.C. (Supp. I) 7543(a). But, in the special case of California, Section 209(b) requires the Administrator to waive this preemption unless he can make certain findings regarding California's regulations. 42 U.S.C. (Supp. I) 7543(b).[1]

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[1] Congress adopted and amended Section 209(b) as an exception to the preemption provision of Section 209(a), to allow California to continue its pioneering role in the regulation of automobile-related emissions. Congress recognized that California's efforts predated those of the federal government in response to an air pollution problem which was, and still is, the most pervasive and acute in the nation. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977). In 1977, Congress reaffirmed the special consideration afforded California by amending Section 209(b) "to ratify and strengthen

Under California law the State Air Resources Board (CARB) is responsible for adopting regulations controlling air pollution from new motor vehicles. After a series of public hearings and workshops, the CARB adopted regulations limiting allowable maintenance applicable to 1980 and subsequent model year gasoline-powered passenger cars and 1981 and subsequent model year gasoline-powered light duty trucks and medium duty vehicles. These regulations limit the scheduled maintenance to be performed on prototypes during certification.[2] To help insure that the in-use performance of production vehicles conforms to test vehicle performance during certification, the regulations, as originally promulgated, included provisions which limited the emissions-related maintenance that a manufacturer could require or

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the California waiver provision and to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare." H.R. Rep. No. 95-294, *supra*, at 301-302.

[2] One facet of certification is the durability testing of a prototype over 50,000 miles to determine the effects of deterioration on the functioning of the emission control system. Both federal and California certification procedures restrict the maintenance that may be performed during durability testing in order to encourage manufacturers to produce more durable vehicles and components. 40 C.F.R. 86.078-23, 86.078-26; Paragraph 3f, California Exhaust Emission Standards and Test Procedures for 1980 and Subsequent Model Passenger Cars, Light Duty Trucks and Medium Duty Vehicles, incorporated by reference in 13 Cal. Admin. Code § 1960(b), as amended September 30, 1977 [hereinafter 1980 Standards and Test Procedures] (A. 1690; "A." refers to the appendix in the court of appeals).

recommend to a vehicle purchaser to the level of maintenance permitted during certification[3] (A. 1204-1217). The regulations permit the CARB to grant exceptions for recommended maintenance related to safety and extreme operating conditions.[4]

The regulations limiting required or recommended maintenance for in-use vehicles reflected California's belief that manufacturers' maintenance instructions were not being followed and that much of the maintenance being performed was being done incorrectly. These factors, according to the State, led to inferior emissions performance of in-use vehicles compared to certification vehicles (A. 3, 1205-1206).[5]

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[3] "Required maintenance" refers to that maintenance which the manufacturers require as a precondition to statutory warranty coverage. "Recommended maintenance" refers to additional maintenance which the manufacturers advise but do not require as a precondition to statutory warranty coverage. The statutory warranties are mandated by Section 207 of the Act, 42 U.S.C. (Supp. I) 7541, which requires manufacturers to warrant that each new vehicle or engine is "free from defects in materials and workmanship" and will conform with applicable emission regulations throughout its useful life. As subsequently amended, the California regulations permit the manufacturers to recommend any maintenance they deem appropriate.

[4] 1980 Standards and Test Procedures ¶ 3g (A. 1691-1692).

[5] Petitioners challenged only those portions of California's regulatory scheme that limited required or recommended in-use maintenance; they did not challenge the limitations on scheduled maintenance during certification. In other words, the manufacturers did not claim that they cannot build a prototype capable of meeting certification requirements; rather, they claimed that they cannot build a production vehicle capable of meeting similar requirements when subjected to actual use.

2. California requested a waiver of federal preemption with respect to the limitations on allowable maintenance and in-use maintenance instructions. Following public hearings,[6] the Administrator granted the waiver request (Pet. App. 73a-85a), concluding that there was no plausible evidence that the restrictions on allowable maintenance would cause California's emission standards (for which a waiver had previously been granted) to be less protective of the public health and welfare than the corresponding federal standards (*id.* at 75a), and that the manufacturers had failed to show that adherence to the regulations would be technologically infeasible (*id.* at 76a-80a). In addition, the Administrator rejected, as beyond the scope of his review under Section 209 (b)(1) of the Act, petitioners' challenges to the constitutionality of the regulations and to the procedures by which California adopted the regulations (*id.* at 81a-82a, 83a-84a).

The CARB subsequently amended its regulations to permit manufacturers to recommend any maintenance they deem appropriate (Pet. App. 100a-101a); however, a vehicle owner's failure to have this additional recommended maintenance performed cannot be a defense to a warranty claim. The EPA informed California that these amendments fell within the scope of the waiver that had previously been granted (Pet. App. 86a-87a).

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[6] An initial hearing was held in August 1977. After enactment of the Clean Air Act Amendments of 1977, a second hearing was held to consider the effect of the amendments on a number of pending waiver requests, including the one at issue here (Pet. App. 75a).

The court of appeals denied the petition to set aside the Administrator's order (Pet. App. 1a-66a). The court concluded that (*id.* at 65a-66a):

> Congress has decided to grant California the broadest possible discretion in adopting and enforcing standards for the control of emissions from new motor vehicles. Section 209 of the Clean Air Act requires the Administrator to waive federal preemption of motor vehicle emission control standards and accompanying enforcement procedures for the State of California unless he makes certain findings that such a waiver is inappropriate. This power encompasses the power to waive federal preemption for in-use maintenance regulations designed as enforcement procedures for pre-existing standards. In evaluating whether a waiver is appropriate for enforcement procedures relating to standards for which a waiver has already been granted, the Administrator is required to address whether the procedures endanger the protectiveness of California's standards and whether the procedures are consistent with section 202(a) of the Clean Air Act. Those favoring the denial of the waiver carry the burden of demonstrating that the waiver is inappropriate. The petitioners here failed to carry that burden.

ARGUMENT

In a careful opinion, the court of appeals rejected petitioners' challenges to the Administrator's determination granting California's waiver request. The decision below is correct, does not conflict with any decision of this Court or other courts of appeals, and

concerns a statute bearing primarily on the right of one state to seek the best means of protecting the health and welfare of its citizens.[7] Accordingly, review by this Court is not warranted.

1. Petitioners argue (Pet. 8-10, 15-18) that the Administrator failed to perform a sufficiently demanding review of California's waiver application. They assert that the Administrator was required by Section 209(b) to conduct an intensive inquiry to determine whether California's regulations are arbitrary and capricious, whether the maintenance limitations are as protective of public health and welfare as applicable federal regulations, and whether California demonstrated a need for such regulations. Petitioners' argument is simply an attempt to rewrite the statute and is flawed in two major respects.

First, Section 209(b) does not impose a burden of persuasion upon California to demonstrate that a waiver is justified, nor does it impose a burden upon the Administrator to make any affirmative findings before granting a waiver. Rather, the statute is mandatory, compelling the Administrator to grant a waiver *unless* he can make one of the findings specified in subsections (b)(1)(A)-(C). As the court below observed (Pet. App. 49a):

[7] Section 177 of the Act, 42 U.S.C. (Supp. I) 7507, permits certain states that have not yet attained compliance with national air quality standards to adopt and enforce California standards for which the Administrator has granted a waiver. To date, no such state has adopted California's regulations.

> That [the Administrator] must deny a waiver if certain facts exist does not mean that he must independently proceed to make the opposite of those findings before he grants the waiver regardless of the state of the record.

Thus, a waiver proceeding contrasts sharply with other administrative proceedings in which a federal agency must make affirmative findings before taking a given action. The cases cited by petitioners (Pet. 15 n.10, 16) involving agencies operating under different statutes are therefore inapposite. The court of appeals correctly concluded (Pet. App. 49a) that under Section 209(b), California's regulations—and that State's determination that the regulations comply with the statute—are presumed to satisfy the waiver requirements; the burden of proving otherwise is upon the parties who oppose the grant of a waiver.

The legislative history of Section 209(b), as the court below noted (Pet. App. 51a n.51), "could not be less ambiguous on this [point]." Congress' express purpose in providing for a waiver of federal preemption was to afford California the broadest possible discretion in establishing regulations designed to mitigate the effects of the State's unique air pollution problems. H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301-302 (1977). Indeed, in 1967 Congress specifically rejected a version of Section 209(b) that would have placed upon California the burden of demonstrating that a waiver was justified and required the Administrator to find affirmatively that

California had met that burden.[8] Accordingly, the Administrator has consistently placed the burden of proof on the parties opposing waiver to demonstrate grounds for making one of the findings necessary for a denial of a waiver request. See, *e.g.*, 40 Fed. Reg. 30311, 30314 (1975). As recently as 1977, Congress approved the Administrator's interpretation that Section 209(b) places the burden of persuasion upon the parties who oppose a waiver request. H.R. Rep. No. 95-294, *supra*, at 302.

Second, as the court of appeals concluded (Pet. App. 29a-35a), Section 209(b) distinguishes between "emission standards" and "accompanying enforcement procedures," intending the former to mean quantitative levels of emissions and the latter to mean methods for determining compliance with a standard. See S. Rep. No. 90-403, 90th Cong., 1st Sess. 32 (1967).[9] Section 209(b) does not require any protectiveness determination or demonstration of need

[8] Compare S. Rep. No. 90-403, 90th Cong. 1st Sess. 33-34 (1967), which accompanied the proposal that is now Section 209(b), with H.R. Rep. No. 90-728, 90th Cong., 1st Sess. 21-23, 69 (1967); see *id.* at 96-97 (separate views of Representatives Moss and Van Deerlin). Petitioners cite as "[t]he most salient legislative history on this question" (Pet. 16 n.11) the discussion in the House Report that accompanied a proposal which ultimately was *rejected* in favor of the Senate version. The court of appeals provided a complete discussion of the legislative history relating to this issue (Pet. App. 50a-52a), and we rely on that discussion here.

[9] This distinction is consistent with this Court's definition of the word "standards" in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 286 (1978).

with regard to accompanying enforcement procedures.[10] The protectiveness determination pertains only to emission standards, not to accompanying enforcement procedures such as the maintenance limitations. Similarly, the "need" referred to in Section 209(b)(1)(B) refers only to standards.

With regard to accompanying enforcement procedures, Section 209(b)(1) permits the Administrator to deny a waiver only if such enforcement procedures are inconsistent with Section 202(a).[11] The section contains no other reference to enforcement procedures. Thus, the Administrator was not required to consider whether the in-use regulations are as protective of the public health and welfare as applicable federal standards or whether the regulations are needed to meet compelling and extraordinary conditions, since these criteria apply only to standards.

[10] Section 209(b) provides that the administrator shall grant the waiver request unless he finds that: (1) California's determination that its *standards* will be, in the aggregate, at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious; (2) California does not need the *standards* to meet compelling and extraordinary conditions; and (3) California's *standards* and *accompanying enforcement procedures* are not consistent with Section 202(a) of the Act.

[11] California's standards and enforcement procedures are judged to be inconsistent with Section 202(a) if they provide insufficient time for the development and application of the requisite technology, giving appropriate consideration to the cost of compliance. 42 U.S.C. (Supp. I) 7521(a)(2).

To be sure, it is conceivable that enforcement procedures might, in some instances, have a direct bearing upon the protectiveness of California's emission standards. The CARB considered this possibility, but determined that the maintenance limitations would not lessen the protectiveness of its standards. (A. 279-280). In the waiver proceeding the Administrator was unable to find clear and compelling evidence that this determination was arbitrary and capricious (Pet. App. 73a-74a, 75a-76a).

Petitioners, however, assert (Pet. 9-10) that the record contains some evidence that the maintenance limitations will have an adverse effect upon air quality. The court of appeals reviewed the materials to which petitioners refer and upheld the Administrator's ruling (Pet. App. 56a-59a). There is no occasion for further review of this factual determination.

Contrary to petitioners' contention (Pet. 12), the court below was careful to note that in reviewing a waiver request the Administrator's "task is something more than ministerial" (Pet. App. 49a). The court indicated that there must be a discernable rational basis for the Administrator's decision, and that (Pet. App. 55a; footnote omitted):

> if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assertions of his own, he runs the risk of having his waiver decision set aside as arbitrary and capricious. His "burden" is the burden of acting reasonably.

The opinion of the court of appeals reflects a careful review of the record and the basis for the Administrator's decision. There is thus no basis for petitioners' contention that the lower court "acquiesced" in some sort of "ministerial" review. If petitioners wish to challenge the substance of the California regulations or the procedures under which they were promulgated, they may do so in the state courts of California.

2. Petitioners contend (Pet. 18-21) that the Administrator improperly refused to consider certain evidence which they presented to him in the course of the waiver hearing. This evidence concerned alleged consequences of the grant of a waiver upon automobile safety, fuel economy and competition within the automotive industry. Petitioners argue that these factors are embraced within the term "public health and welfare," as used in Sections 209(b)(1) and 202(a)(4). This contention is without merit.

As the court of appeals correctly concluded, the phrase "public health and welfare" in the statute refers to the effects of pollution on the environment (Pet. App. 43a; footnote omitted):

> Congress enacted the Clean Air Act as an attempt to improve the quality of the air. This concern with pollution was not confined to its adverse effects on humans, but extended as well to its impact on the economy. The terms "public health and welfare" thus encompass economic values, but only to reflect the economic costs of pollution, not the social costs of pollution control. This is evident in every context in which the terms appear.

See also H.R. Rep. No. 95-294, *supra*, at 34. The question whether the social costs of pollution control should be considered in a waiver proceeding is one for Congress to decide in the first instance, and, therefore, petitioners' arguments on this point must be addressed to Congress, rather than to the administrative agency or the courts.[12]

3. Petitioners argue (Pet. 21-22) that the Administrator should have ruled upon their constitutional challenges to the waiver request. But "[n]othing in section 209 requires [the Administrator] to consider the constitutional ramifications of the regulations for which California requests a waiver" (Pet. App. 36a). Petitioners' contention that an administrative agency has the inherent power to rule upon constitutional claims is unfounded. See *Public Utilities Comm'n of California* v. *United States*, 355 U.S. 534, 539 (1958); *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 242 (1968). The ruling of the court below on this point is perfectly consistent with decisions in other circuits.[13] In any event, petitioners

[12] Petitioners' reliance (Pet. 20 n.15) on *Gulf State Utilities Co.* v. *FPC*, 411 U.S. 747 (1973) and *Federal Maritime Comm'n* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), is misplaced. As the court below pointed out (Pet. App. 44a-46a), those cases involved agencies operating under clear congressional mandates to consider antitrust implications in their administrative determinations.

[13] *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371 (2d Cir.), cert. denied, 398 U.S. 958 (1970), did not concern a constitutional *ruling* by the SEC, but rather the SEC's application of a *statutory* exclusion based upon the First Amendment. In *Plano* v. *Baker*, 504 F.2d 595 (2d Cir. 1974), the Second Circuit, correcting any possible misconceptions concerning its decision in *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970), stated that an administrative agency may not consider constitutional challenges on the merits. 504 F.2d at 599 & n.6. In *Downen* v. *Warner*, 481 F.2d 642, 643 (9th Cir. 1973), the Ninth Circuit ruled that constitutional adjudications must be left to the courts because such issues are beyond the expertise of administrative agencies. In *Midwest Video Corp.* v. *FCC*, 571 F.2d 1025, 1042-1043 (8th Cir. 1978), aff'd, 440 U.S. 689 (1979), the Eighth Circuit struck down an FCC decision, ostensibly based upon First Amendment considerations, and held that without clear statutory authority the Commission had no jurisdiction to advance perceived constitutional interests on its own. Finally, in *Spiegel, Inc.* v. *FTC*, 540 F.2d 287, 294 (7th Cir. 1976), the Seventh Circuit ruled that federal administrative agencies cannot pass upon the constitutionality of administrative or legislative action.

were not deprived of a forum in which to present their constitutional claims, since those claims were passed upon by the court of appeals.

4. Petitioners' arguments (Pet. 22-24) on the merits of the constitutional issue must also fail. Their assertion that the California maintenance limitations violate the First Amendment by restricting communication between auto manufacturers and consumers overlooks the settled rule that commercial speech may be regulated if such regulation bears a rational relationship to a legitimate state interest. *Banzhaf* v. *FCC*, 405 F.2d 1082, 1102 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969), cited with approval in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976). That is the case here. Studies conducted by the CARB found that a relationship exists between the failure of in-use vehicles to achieve emis-

sion standards and the amount of maintenance (or lack thereof) which a vehicle owner performs on emission-related components. The CARB determined that its maintenance regulations will force manufacturers to develop more durable engine components, thereby reducing the number of necessary maintenance operations; the CARB determined that this will, in turn, reduce the frequency of component failures due to lack of, or improper, maintenance (A. 1205-1209, 1629-1674, 1815-1819). Thus, the regulations are rationally related to the legitimate state interest of reducing automobile emission levels and are constitutionally permissible.

In any case, California's regulations do not restrict the manufacturers' communications with their customers. The regulations, as amended, only distinguish between required and recommended maintenance. Manufacturers are free to recommend any maintenance they deem appropriate; they simply may not deny a warranty claim on the basis of a failure to perform such recommended maintenance. Petitioners' assertion (Pet. 23-24) that automobile purchasers may ignore the manufacturers' recommendations does not implicate legitimate First Amendment concerns. The First Amendment's protection of freedom of speech "provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979), quoting *Hanover Township Federation of Teachers* v. *Hanover Community*

School Corp., 457 F.2d 456, 461 (7th Cir. 1972).[14]

5. Lastly, petitioners argue (Pet. 24-26) that the court below gave excessive deference to the Administrator's construction of the waiver provision. We disagree.

The court of appeals held (Pet. App. 17a) that it could not "conclude that the Administrator misconstrued Section 209 [unless] petitioners * * * show by clear and convincing evidence that his construction is unreasonable." This ruling correctly articulated the standard of deference which this Court has typically applied to a nearly contemporaneous construction of a statute by an agency charged with administering it. See *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979); *Union Electric Company* v. *EPA*, 427 U.S. 246, 256

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[14] The cases relied upon by petitioners (Pet. 22-23) are readily distinguishable, since they each concerned a virtually complete ban on the communication of certain information. See *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra. Consolidated Edison Company of New York* v. *Public Service Comm'n of New York*, No. 79-134, and *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, No. 79-565 (argued Mar. 17 1980), are similarly inapposite. *Consolidated Edison* involves an order prohibiting electric utilities from including messages on controversial matters of public policy with bills sent to consumers, and *Central Hudson* involves a ban on promotional advertising by such utilities. Here, however, the manufacturers are not prohibited from communicating with their customers. Moreover, unlike *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), this case does not concern the compelled publication of information by a newspaper.

(1976); *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975). Thus, in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975), this Court ruled that EPA's interpretation of the Clean Air Act should be accepted so long as it is "sufficiently reasonable." And in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court held that an agency's interpretation of a statute which it is charged with administering "should be followed unless there are compelling indications that it is wrong, *especially when Congress has refused to alter the administrative construction.*" *Id.* at 381 (emphasis added; footnotes omitted).

The Administrator's construction of the waiver provision has been consistent.[15] In 1977 Congress not only declined to overturn that construction, but took steps "to ratify and strengthen the California waiver provision and * * * to afford California the broadest possible discretion in selecting the best means to protect the health of its citizens and the public welfare." H.R. Rep. No. 95-294, *supra*, at 301-302. In these circumstances, the court below was fully justified in giving deference to the Administrator's construction.[16]

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[15] The Administrator has explained in detail the basis for his interpretation (A. 1853-1855) and has consistently abided by that interpretation.

[16] There is no possibility that another court of appeals will reach a different interpretation of Section 209, because exclusive review of California waiver decisions rests with the District of Columbia Circuit under Section 307(b) of the Clean Air Act, 42 U.S.C. (Supp. I) 7607(b).

Despite its deference to the Administrator's interpretation of Section 209(b), the court of appeals nevertheless undertook its own thoroughgoing examination of the language, legislative history and congressional purpose of this somewhat technical and complex provision. It was only after completion of that examination that the court of appeals concluded—correctly, we submit—that the Administrator's interpretation should be upheld.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

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GENERAL MOTORS CORPORATION, et al., *Petitioners*,

v.

DOUGLAS M. COSTLE, Administrator of the Environmental Protection Agency, ENVIRONMENTAL PROTECTION AGENCY, and STATE OF CALIFORNIA, *Respondents*.

Reply To Federal Respondents And Supplemental Brief In Support Of Petition For A Writ Of Certiorari

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

I. RESPONDENTS ERRONEOUSLY DEFEND THE LOWER COURT'S EXTRAORDINARY DEFERENCE TO THE STATUTORY INTERPRETATIONS BY WHICH THE ADMINISTRATOR HAS ABDICATED HIS RESPONSIBILITY TO PROTECT AIR QUALITY 2

II. RESPONDENTS HAVE ATTEMPTED TO DISGUISE THE FACT THAT THE HOLDINGS OF THE COURT BELOW CONFLICT WITH *Virginia State Board* AND OTHER RELEVANT PRECEDENTS 6

III. MATERIAL NOT AVAILABLE WHEN THE PETITION WAS FILED UNDERSCORES THE LOWER COURT'S ERROR IN ALLOWING THE ADMINISTRATOR TO DISREGARD COMPLETELY FEDERAL STATUTORY POLICIES OTHER THAN AIR QUALITY 8

CONCLUSION 11

TABLE OF AUTHORITIES

CASES CITED:

Banzhaf v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) 7

Ford Motor Company v. *EPA*, 606 F.2d 1293 (D.C. Cir. 1979) 5

Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 (1977) 7

Midwest Video Corp. v. *FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) 6

Motor and Equipment Manufacturers Association, Inc. v. *Costle*, No. 78-1896 (D.C. Cir. Aug. 3, 1979)..passim

Plano v. *Baker*, 504 F.2d 595 (2d Cir. 1974) 6

Page

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 2

Spiegel, Inc. v. *FTC*, 540 F.2d 287 (7th Cir. 1976) 7

Train v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) 2

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 7, 11

FEDERAL STATUTES CITED:

Clean Air Act, 42 U.S.C. § 7401 et seq.
§ 207, 42 U.S.C. § 7541 7
§ 209, 42 U.S.C. § 7543 .....passim
§ 307, 42 U.S.C. § 7607 5

CONGRESSIONAL MATERIALS CITED:

H.R. Rep. No. 728, 90th Cong., 1st Sess. (1967) 3
H.R. Rep. No. 95-294, 95th Cong., 1st Sess. (1977) 4

MISCELLANEOUS SOURCES CITED:

FTC, Bureau of Competition, "Comments Regarding California Automobile Emission Control System Warranty Regulations" (March 31, 1980) 8-11

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Reply To Federal Respondents And Supplemental Brief In Support Of Petition For A Writ Of Certiorari

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The brief in opposition of the federal respondents (Opp. Br.) attempts to obscure them, but the issues in this case are important questions of first impression and of national significance, involving the proper interpretation of Section 209(b) of the Clean Air Act, the constitutional rights of automakers to disseminate—and consumers to receive—information, and the duty of the court below to interpret Section 209(b) without slavish deference to the erroneous statutory interpretations of the EPA Administrator. The case highlights the pressing need for this Court to insist that reviewing courts require administrative agencies

to consider and weigh the effects of their regulations on affected statutory and constitutional policies, instead of obliviously pursuing the single-purpose mission that is at the core of their statutory responsibilities. Pursuant to Rule 24(4)-(5) of this Court, petitioners submit this brief to address arguments first raised in the brief in opposition, and petitioners Motor and Equipment Manufacturers Association and Automotive Service Industry Association call to the Court's attention supplemental matters not available when the petition was filed.

I. Respondents Erroneously Defend the Lower Court's Extraordinary Deference to the Statutory Interpretations by Which the Administrator Has Abdicated His Responsibility to Protect Air Quality.

The court below adopted an extraordinarily sweeping standard of deference to the statutory interpretations of the Administrator, a standard the federal respondents can defend only by cobbling together, out of their separate contexts, considerably narrower standards announced by this Court. Opp. Br. at 17-18.[1] It is only by such an expedient that respondents could hope to defend the statutory holding below that the Administrator may "sit back, 'like an umpire, and

[1] The court below stated: "For us to conclude that the Administrator misconstrued section 209 petitioners must show *by clear and convincing evidence* that [the Administrator's] construction [of the statutory language] is *unreasonable.*" Slip op., App. at 17a (emphasis added). Respondents can defend this holding only by citing *in combination* the *alternative* standards of deference announced in *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975) (courts to defer to "sufficiently reasonable" agency interpretation) and *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969) (courts to defer to agency interpretation absent "compelling indications it is wrong").

[merely] resolve adversary contentions.'" Slip op., App. at 55a n.56.

In demonstrating that Section 209(b) charges the Administrator affirmatively to represent and protect the federal statutory interest in air quality, petitioners cited H.R. Rep. No. 728, 90th Cong., 1st Sess. 96 (1967) (emphasis added):

> "[Under Section 209(b) t]he burden would be on *the* [*Administrator*] to show why California . . . should not be allowed to go beyond the Federal limitations in adopting and enforcing its own standards."

The federal respondents contend that "the discussion in the House Report . . . accompanied a proposal which ultimately was *rejected* in favor of the Senate version." Opp. Br. at 10 n.8 (emphasis in original). Respondents are in error. Not only did the quoted legislative history address the Senate version of Section 209(b), but its very point was that Congress sought to allocate responsibilities between *only* the federal agency and California. Congress never assigned any role to private opponents, much less imposed the inordinate burden upheld by the court below.

The federal respondents similarly misuse a fragment of legislative history concerning the 1977 amendments to Section 209(b). Prior to 1977 California regulations could be waived only if they were "more stringent" than applicable federal standards. In 1977 Congress amended the section to permit waiver if the California regulations were "as protective" as federal standards so that California could relax federal carbon monoxide standards in a technological "tradeoff" for establishing particularly stringent standards for oxides

of nitrogen. *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301-302 (1977). Citing the explanatory legislative history, respondents argue that California is to have the "broadest possible discretion in establishing regulations designed to mitigate the effects of the State's unique air pollution problems." Opp. Br. at 9. But there is nothing in the legislative history that suggests a congressional intent to relieve the Administrator of his statutory duty affirmatively to protect the federal interests embodied in the Clean Air Act, including air quality.

The federal respondents also suggest that the court below, and the Administrator, addressed petitioners' evidence concerning the effect of the in-use maintenance regulations on air quality, so "[t]here is no occasion for further review of this factual determination." Opp. Br. at 12. But petitioners did not ask the court below, and do not ask this Court, to review factual considerations, but rather to confirm that Section 209(b) requires the Administrator to consider evidence that a waiver will denigrate air quality. Such confirmation is required because, as shown in the petition, the court below tolerated waiver proceedings in which the Administrator stated that he was statutorily prohibited from considering evidence relevant to air quality. Pet. at 16-17. As a result, the waiver stands today even though California conceded that it cannot estimate the potential beneficial effect of the regulations on air quality, EPA conceded that there is evidence of adverse effects on air quality, and the court below conceded that there was "room for disagreement about the potential benefits of the in-use maintenance regulations." Pet. at 17-18. Stated differently, the point is not merely that the Administrator's factual

findings were erroneous, but that his alleged factual inquiry was illusory. Pet. at 16-17. The federal respondents have completely failed to explain just what, if any, factual inquiry the Administrator is required to conduct,[2] and respondents thus apply the last brush strokes to the portrait of the Administrator that has emerged from this case. Unfortunately, that portrait evokes the *Wizard of Oz,* displaying a figure claimed to be of Solomonic grandeur until the curtain is pulled aside and a little man is seen mechanically manipulating levers in preparation for the announcement of a predetermined conclusion—the grant of a waiver.[3]

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[2] The federal respondents attempt to breathe life into the Administrator's role by a semantic game, insisting that the court below defined his " 'task [as] something more than ministerial.' " Opp. Br. at 12, *quoting* slip op., App. at 49a. But the court also specified just what that "something" was. The opinion stated that the Administrator's review is to be "largely ministerial." Slip op., App. at 55a n.56. And, in a companion case, the court stated that his review is to be "cursory." ***Ford Motor Co.*** v. ***EPA,*** 606 F.2d 1293, 1302 (D.C. Cir. 1979).

[3] The federal respondents suggest that "[t]here is no possibility that another Court of Appeals will reach a different interpretation of Section 209, because exclusive review of California waiver decisions rests with the District of Columbia Circuit under Section 307(b) of the Clean Air Act." Opp. Br. at 18 n.16. Respondents misstate Section 307(b), 42 U.S.C. § 7607(b). Judicial review of waiver decisions is in the District of Columbia Circuit only if a waiver is "nationally applicable," as the Administrator determined this waiver to be (incidentally belying the respondents' contention that this case concerns only California, *see* Opp. Br. at 7-8). But some Section 209(b) waivers may be of local or regional impact, in which case review will be in the Ninth Circuit. *See* Section 307(b). When the Ninth Circuit is called upon to consider Section 209(b) proceedings, it should have the guidance of this Court, not that of the opinion below.

II. Respondents Have Attempted to Disguise the Fact That the Holdings of the Court Below Conflict With *Virginia State Board* and Other Relevant Precedents.

Petitioners contend that during waiver proceedings the Administrator must consider First Amendment questions, especially since his constitutional inquiry would illuminate subsequent judicial proceedings. In conflict with the principles of relevant precedents, the court below held that the Administrator need not address First Amendment objections. *See* Pet. at 21-22. The federal respondents attempt to deny this conflict by misstating the relevant case law. They claim that *Plano* v. *Baker,* 504 F.2d 595 (2d Cir. 1974), "[corrected] any possible misconceptions . . . that an administrative agency may . . . consider constitutional challenges on the merits." Opp. Br. at 14 n.13. The *Plano* court held, rather, that because of the severely limited factfinding capacity of the agency in question, constitutional issues were not required to be presented to that particular agency even though such exhaustion would be required in other cases. Here the Administrator is the acknowledged federal expert on air pollution and is statutorily empowered to conduct hearings adequate to address the factual issues relevant to First Amendment analysis. He should therefore have considered the constitutional issues.[4]

[4] The federal respondents also misstate the holding of *Midwest Video Corp.* v. *FCC,* 571 F.2d 1025, 1042-1043 (8th Cir. 1978), *aff'd,* 440 U.S. 689 (1979). *See* Opp. Br. at 14 n.13. The court held that the FCC could not assert regulatory jurisdiction over cable broadcasting simply to advance First Amendment interests, whereas here the Administrator has unquestioned regulatory authority over waiver requests and the issue is whether a request should be denied if its approval would result in a violation of First Amendment rights. Similarly, the Seventh Circuit did not "[rule] that federal administrative agencies cannot pass upon the constitutionality of administrative or legislative action" in *Spiegel, Inc.* v. *FTC,* 540 F.2d 287, 294 (7th Cir. 1976). Opp. Br. at 14 n.13. Rather, the court held that the constitutional issue considered by the agency must be addressed on a case-by-case basis, whereas the agency had purported to reach a *per se* constitutional ruling.

On the merits of the First Amendment issue, the federal respondents cite *Banzhaf* v. *FCC,* 405 F.2d 1082, 1102 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969), to support the lower court's holding that restrictions on communications between automakers and consumers are constitutional if they have "a reasonable basis in a legitimate governmental policy." Slip op., App. at 64a. This holding, however, directly conflicts with the holding in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). The constitutional test announced there is whether the state *needs* its regulations to accomplish a legitimate state interest. *See id.* at 769-70; *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. 85, 95 (1977).[5]

[5] The federal respondents suggest that no First Amendment issue exists because, after amendment of the in-use maintenance regulations, "[m]anufacturers are free to recommend any maintenance they deem appropriate." Opp. Br. at 16. Such "freedom," however, does not include the right to inform consumers that manufacturers' warranty obligations are conditioned on performance of all recommended maintenance, as Congress intended. Section 207 (a), (c)(3) of the Clean Air Act, 42 U.S.C. § 7541(a), (c)(3). Moreover, these regulations, hastily amended after litigation commenced, Pet. at 11-12, impede and frustrate communications with consumers by creating powerful incentives for the consumer to disregard mere "recommendations." Pet. at 23-24.

III. Material Not Available When the Petition Was Filed Underscores the Lower Court's Error in Allowing the Administrator to Disregard Completely Federal Statutory Policies Other Than Air Quality.

Petitioners Motor and Equipment Manufacturers Association and Automotive Service Industry Association are representatives of the "aftermarket" (businesses that supply parts and services for automobiles in use). They wish to call to the Court's attention a document recently filed by the Bureau of Competition of the Federal Trade Commission (FTC) with the California Air Resources Board (CARB), entitled "Comments Regarding California Automobile Emission Control System Warranty Regulations" (March 31, 1980).[6] The document is of interest because it demonstrates a disagreement within the Federal Government itself concerning whether the Administrator's waiver proceedings may disregard relevant federal statutory policies such as competition, as the court below held. *See* Pet. at 18-21.[7]

The Bureau of Competition comments are addressed to a set of regulations closely related to the in-use maintenance regulations in question here. The in-use maintenance regulations prohibit automobile manufacturers from "requiring" (as a precondition of emissions warranty coverage) the performance of any maintenance except nine discrete items during the first 50,000 miles of vehicle usage, although additional maintenance may be "recommended." Pet. at 6-7,

[6] For the convenience of the Court, 10 copies of this document have been lodged with the Clerk.

[7] The federal respondents devote a scant page of discussion to this issue, a reticence perhaps explained by the disagreement discussed in the text.

11-12. The warranty regulations actually impose the obligation to warrant emissions-related parts against defects during the first 50,000 miles of usage (if the limited "required" maintenance has been performed).

The Bureau of Competition notes that "EPA studies have shown that most vehicles meet federal standards at the time they are produced and, moreover, that emission control devices are 'reasonably durable.'" Comments at 13. "[*I*]*f properly maintained,* [current vehicle models] will meet emission standards," *id.* at 11 (emphasis in original), and "poor maintenance practices by consumers [, not equipment design, are] the chief cause of excessive automobile emissions." *Id.* at 6.[8] As a result, regulations reducing in-use maintenance will probably have adverse air quality results, while also reducing competition in the maintenance aftermarket, to the detriment of consumers and competitors. *E.g., id.* at 8. Dramatically better air quality and competitive results can be achieved by inspection and maintenance (I/M) programs, already in use outside California. Under such programs, cars are inspected annually, and drivers must bring noncomplying vehicles into compliance. The basic premise is that

[8] These EPA findings belie the litigative posture adopted here by the federal respondents, who suggest it is surprising that manufacturer petitioners believe more maintenance is required for vehicles in actual use than is required during certification testing. *See* Opp. Br. at 5 n.5. In other contexts, EPA has recognized the commonsensical—a controlled four-month certification test cannot simulate five years or 50,000 miles of driving under the widely divergent conditions encountered in vehicle usage. The maintenance reasonable during certification testing therefore is not *ipso facto* the maintenance reasonable during vehicle usage.

more, rather than less, maintenance should be performed to benefit air quality. *Id.* at 4-9.

Against this background, the Bureau of Competition expressly rejects the Administrator's complete disregard of relevant federal statutory policies other than air quality, arguing that Section 209(b) requires consideration of both air quality and competition in waiver proceedings. Noting that the FTC had submitted comments emphasizing competitive issues in waiver proceedings, the Bureau states:

> "The FTC [comments were] submitted . . . prior to the court of appeals' ruling [in the instant case]. The Commission relied on the Congressional design in enacting the Clean Air Act Amendments of 1977 'to protect the automotive aftermarket parts and service industry from any potential anticompetitive impacts of the auto emission warranty requirements.' S. Rep. No. 95-127, 95th Cong., 1st Sess. 15 (1977). *See also,* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 291-97 (1977). *Although the statutory waiver criteria do not expressly include antitrust considerations, potential anticompetitive effects could warrant the conclusion that the CARB regulations are 'arbitrary and capricious' or are not necessary 'to meet compelling and extraordinary conditions,' both of which are grounds for denying a Clean Air Act waiver.* 42 U.S.C. § 7543(b)(1)." Comments at 3 n.9 (emphasis added).

The disarray within the Government itself underscores the need for this Court's review—not to resolve the underlying factual issues, but to determine whether the court below erred in allowing the Administrator

to disregard completely relevant federal statutory policies.[9]

IV. Conclusion

For the reasons stated herein and in the petition, petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

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[9] The Bureau's comments also demonstrate that California's regulations do not meet the "need" test established by *Virginia State Board* for permissible restrictions on automakers' First Amendment rights. Restrictions on in-use maintenance simply do not "address the major causes of cars exceeding emission standards—poor maintenance and tampering," and EPA itself "believes the I/M strategy [, not restrictions on maintenance,] offers the most effective solution to these problems." Comments at 7, 14.

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